THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346·4
Mx. North Sea.

UNIVERSITY OF LONDON
LIBRARY

Edward B. Sumner
Lunenburg
1877

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1875-1876_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR JOHN HOLKER, Knt., M.P. . .	ATTORNEY GENERAL.
SIR HARDINGE S. GIFFARD, Knt. . .	SOLICITOR GENERAL.

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING	Serjeants' Inn.
W. B. GLASSE, ESQ., Q.C. JOHN PEARSON, Esq., Q.C.	Lincoln's Inn.
WILLIAM FORSYTH, Esq., M.P., Q.C. JAMES FITZJAMES STEPHEN, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. ALFRED WILLS, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. COOKSON, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

LAW REPORTS.

Queen's Bench Division.

REPORTED BY

WILLIAM MILLS AND ARTHUR P. STONE,
BARRISTERS-AT-LAW;

AND

IN THE COURT FOR CROWN CASES RESERVED

BY

ARTHUR WILSON,
BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. I.

FROM MICHAELMAS SITTINGS, 1875, TO TRINITY SITTINGS, 1876,
BOTH INCLUSIVE.
XXXIX VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
1876.

BIBL. LONDIN

BIBL.
LONDIN

JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

XXXIX VICTORIA.

The Right Hon. Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of England, President.

Sir Colin Blackburn, Knt.

Sir John Mellor, Knt.

Sir Robert Lush, Knt.

Sir John Richard Quain, Knt.

Sir William Ventris Field, Knt.

ATTORNEY GENERAL.

Sir John Holker, Knt.

SOLICITOR GENERAL.

Sir Hardinge Stanley Giffard, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
104	5 from top	made absolute	discharged.
131	13 from bottom ..	after c. 63	add s. 54.
186	5 from top	*A. L. Smith*	*Lumley Smith.*
190	16 „	defendant	plaintiff.
309	9 „	*Dibdin*	*Dibbin.*
348	7 from bottom ..	*Marwood* v. *Smith* ..	*Horwood* v. *Smith.*
369	9 „ ..	defendant	plaintiff.
381	3 „ ..	policy	voyage policy.
482	7 Head-note ..	Blackburn	Blackburn, J.
513	2 from bottom ..	recognised	negatived.
692	8 from top	*Weston*	*Watson.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aberayron Mutual Ship Insurance Company, Edwards *v.* (Ex. Ch.)	563
Adamson, Reg. *v.*	201
———, Wear Commissioners *v.* (C. A.)	546
Ashton, Tarry *v.*	314
Aspinall, Reg. *v.*	730
Attwood *v.* Case	134

B.

Banagher Distillery Company, Limited, Walker *v.*	129
Barnet, Phillips *v.*	436
Barnet Sanitary Authority, Reg *v.*	558
Batt *v.* Price	264
Beardsall, Reg. *v.* (C. C. R.)	452
Bedminster Union, Reg. *v.*	503
Begbie *v.* Phosphate Sewage Company (C. A.)	679
Benecke *v.* Frost	419
Berry *v.* Exchange Trading Company	77
——, Reg. *v.* (C. C. R.)	447
Bettini *v.* Gye	183
Bosley *v.* Davies	84
Bower *v.* Hartley (C. A.)	652
——— *v.* Peate	321
Bowes, Shand *v.*	470
———, Taylor *v.* (C. A.)	291
Brandt *v.* Lawrence (C. A.)	344
Brigden *v.* Heighes	330
Britannia Ironworks Company, Metcalfe *v.*	613
Brown, Thomas *v.*	714
Bustros *v.* White (C. A.)	423
Byers, Thiis *v.*	244

C.

Case, Attwood *v.*	134
Chorlton-upon-Medlock, Reg. *v.*	62
Colebeck *v.* Girdlers Company	234
Collins, Reg. *v.*	336
Colville, C. R., Ex parte	133
Comptoir d'Escompte de Paris, Lutscher *v.*	709
Cook, Smith *v.*	79
Cooper, Reg. *v.*	19
Cotton, Mercier *v.* (C. A.)	442
Coulbert *v.* Troke	1

PAGE
Coupland, Howell *v.* (C. A.) 258
Cresswell, Reg. *v.* (C. C. R.) 446
Cundy, Lindsay *v.* 348

D.

Davies, Bosley *v.* 84
——— *v.* Garland 250
———, McHole *v.* 59
Dawkins *v.* Prince Edward of Saxe Weimar 499
——— *v.* Stephenson 499
——— *v.* Wynyard 499
De Hart *v.* Stevenson 313
De Rutzen, Reg. *v.* 55
Dixon *v.* London Small Arms Company (C. A.) 384
Downes, Reg. *v.* 25
Drayton Highway Board, Reg. *v.* 608
Dudgeon *v.* Pembroke (Ex. Ch.) 96
Duncan, Swansea Shipping Company *v.* (C. A.) 644

E.

Edwards *v.* Aberayron Mutual Ship Insurance Company (Ex. Ch.) 563
Ellershaw, Re 481
Elliott, Lyons *v.* 210
English *v.* Tottie 141
Evans *v.* Hooper (C. A.) 45
——— *v.* Morris 145
Everett, Polak *v.* (C. A.) 669
Exchange Trading Company, Berry *v.* 77

F.

Foster *v.* Gamgee 666
Frost, Benecke *v.* 419

G.

Gamgee, Foster *v.* 666
Garland, Davies *v.* 250
Gaskell, Lee *v.* 700
Gatenby *v.* Morgan 685
Gery *v.* Redman 161
Gill, Re 78
Girdlers Company, Colebeck *v.* 234
PAGE
Glover, Hutchinson *v.* 138
Golding *v.* Wharton Saltworks Company (C. A.) 374
Gray *v.* North Eastern Railway Company 696
Great Eastern Railway Company, Way *v.* 692
Great Northern Railway Company, Leggott *v.* 599
Great Western Railway Company, Harris *v.* 515
———————, Purnell *v.* 636
Greenhalgh, Pendlebury *v.* (C. A.) 36
Greenhow, Reg. *v.* 703
Gye, Bettini *v.* 183

H.

Hampden *v.* Walsh 189
Harris *v.* Great Western Railway Company 515
Hartley, Bower *v.* (C. A.) 652
Haynes, Redgate *v.* 89
Heighes, Brigden *v.* 330
Hingston v. Wendt 367
Hooper, Evans *v.* (C. A.) 45
——— *v.* Keay 178
Horner, Walker *v.* 4
Howell *v.* Coupland (C. A.) 258
Hudson *v.* Tabor 225
Hutchinson *v.* Glover 138

I.

Imperial Marine Insurance Company, Stribley *v.* 507

J.

Jones *v.* Jones 279

K.

Keay, Hooper *v.* 178
Kirby, Smith *v.* 131
Kopitoff *v.* Wilson 377

L.

Lancashire and Yorkshire Railway Company, Sneesby *v.* (C. A.) 42
Lawes, Pulbrook *v.* 284

PAGE

Lawrence, Brandt *v.* (C. A.) 344
Lee *v.* Gaskell 700
——, Reg. *v.* 198
Leggott *v.* Great Northern Railway Company 599
Lewis, Re. Ex parte Munro 724
Lindsay *v.* Cundy 348
Lister *v.* Van Haansbergen 269
London and North Western Railway Company, Simpson *v.* 274
——————— Wright *v.* (C. A.) 252
London School Board *v.* St. Mary, Islington 65
London Small Arms Company, Dixon *v.* (C. A.) 384
London, Union Bank of, Smith *v.* 31
Longbottom, Ex parte 481
Lutscher *v.* Comptoir d'Escompte de Paris 709
Lyons *v.* Elliott 210

M.

Maughan, Ex parte 49
McHole *v.* Davies 59
Meiklereid *v.* West 428
Mercier *v.* Cotton (C. A.) 442
Mesquita, Runnacles *v.* 416
Metcalfe *v.* Britannia Ironworks Company 613
Metropolitan Board of Works *v.* New River Company 727
Meyer, Reg. *v.* 173
Mile End, Vestry of, *v.* Whitechapel Union (C. A.) 680
Morgan, Gatenby *v.* 685
Morris, Evans *v.* 145
Morritt *v.* North Eastern Railway Company (C. A.) 302
Munro, Ex parte. Re Lewis 724

N.

New River Company, Metropolitan Board of Works *v.* 727
North Eastern Railway Company, Gray *v.* 696
——————— Morritt *v.* (C. A.) 302

PAGE

North Metropolitan Tramways Company, Vestry of St. Luke *v.* 760

O.

Oliphant, Wadling *v.* 145

P.

Page, Roberts *v.* 476
Peate, Bower *v.* 321
Pembroke, Dudgeon *v.* (Ex. Ch.) 96
Pendlebury *v.* Greenhalgh (C. A.) 36
Phillips *v.* Barnet 436
———, Re 78
Phosphate Sewage Company, Begbie *v.* (C. A.) 679
Polak *v.* Everett (C. A.) 669
Postmaster General, Reg. *v.* 658
Poussard *v.* Spiers 410
Price, Batt *v.* 265
Prince Edward of Saxe Weimar, Dawkins *v.* 499
Pulbrook *v.* Lawes 284
Purnell *v.* Great Western Railway Company (C. A.) 636

R.

Raffles, Reg. *v.* 207
Randell & Co. *v.* Thompson (C. A.) 748
Rawley *v.* Rawley (C. A.) 460
Redgate *v.* Haynes 89
Redman, Gery *v.* 161
———, Swire *v.* 536
Reg. *v.* Adamson 201
—— *v.* Aspinall 730
—— *v.* Barnet Sanitary Authority 558
—— *v.* Beardsall (C. C. R.) 452
—— *v.* Bedminster Union 503
—— *v.* Berry (C. C. R.) 447
—— *v.* Chorlton-upon-Medlock 62
—— *v.* Collins 336
—— *v.* Cooper 19
—— *v.* Cresswell (C. C. R.) 446
—— *v.* De Rutzen 55
—— *v.* Downes 25

PAGE

Reg. *v.* Drayton Highway Board 608
—— *v.* Greenhow 703
—— *v.* Justices of West Riding of Yorkshire 220
—— *v.* Lee 198
—— *v.* Meyer 173
—— *v.* New Windsor 152
—— *v.* Postmaster General 658
—— *v.* Raffles 207
—— *v.* Rippon 217
—— *v.* Rustomjee 487
—— *v.* Saunders 15
—— *v.* Steel 482
—— *v.* Sykes 52
—— *v.* Verrall 9
—— *v.* Welch 23
Rippon, Reg. *v.* 217
Roberts *v.* Page 476
Royal Wax Candle Company, Scott *v.* 404
Runnacles *v.* Mesquita 416
Rustomjee *v.* The Queen 487

S.

Saunders, Reg. *v.* 15
Scott *v.* Royal Wax Candle Company 404
Shand *v.* Bowes 470
Shillito *v.* Thompson 12
Silber, Sugg *v.* 362
Simpson *v.* London and North Western Railway Company 274
Smith *v.* Cook 79
—— *v.* Kirby 131
—— *v.* Union Bank of London 31
Sneesby *v.* Lancashire and Yorkshire Railway Company (C. A.) 42
Spiers, Poussard *v.* 410
Steel, Reg. *v.* 482
Stephenson, Dawkins *v.* 499
Stevenson, De Hart *v.* 313
St. Luke, Vestry of, *v.* North Metropolitan Tramways Company 760
St. Mary, Islington, London School Board *v.* 65
Stribley *v.* Imperial Marine Insurance Company 507

PAGE

Sugg *v.* Silber 362
Swansea Shipping Company *v.* Duncan (C. A.) 644
Swire *v.* Redman 536
Sykes, Reg. *v.* 52

T.

Tabor, Hudson *v.* 225
Tarry *v.* Ashton 314
Taylor *v.* Bowers (C. A.) 291
Thiis *v.* Byers 244
Thomas *v.* Brown 714
Thompson, Randell & Co. *v.* (C. A.) 748
——, Shillito *v.* 12
Tottie, English *v.* 141
Troke, Coulbert *v.* 1

V.

Van Haansbergen, Lister *v.* 269
Verrall, Reg. *v.* 9

W.

Wadling *v.* Oliphant 145
Walker *v.* Banagher Distillery Company, Limited 129
—— *v.* Horner 4
Walsh, Hampden *v.* 189
Way *v.* Great Eastern Railway Company 692
Wear Commissioners *v.* Adamson (C. A.) 546
Welch, Reg. *v.* 23
Wendt, Hingston *v.* 367
West, Mecklereid *v.* 428
Wharton Saltworks Company, Golding *v.* (C. A.) 374
White, Bustros *v.* (C. A.) 423
Whitechapel Union, Vestry of Mile End *v.* (C. A.) 680
Wilson, Kopitoff *v.* 377
Windsor, New, Reg. *v.* 152
Wright *v.* London and North Western Railway Company (C. A.) 252
Wynyard, Dawkins *v.* 499

Y.

Yorkshire, West Riding, Justices of, Reg. *v.* 220

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Grane	1 Cr. & M. 380	211
Alexander *v.* Vanderzee	Law Rep. 7 C. P. 530	471, 472, 474, 475
Allan *v.* Mawson	2 Camp. 115	530
Alner *v.* Georges	1 Camp. 392	297
Alston *v.* Grant	3 E. & B. 128	240
Angell *v.* Duke	Law Rep. 10 Q. B. 174	287
——— *v.* Paddington	Law Rep. 3 Q. B. 714	69
Appleby *v.* Myers	Law Rep. 2 C. P. 651	260, 261
Ashcroft *v.* Crow-Orchard Colliery Company	Law Rep. 9 Q. B. 540	247
Atkinson *v.* Bell	8 B. & C. 277, 283	186
Avards *v.* Dance	26 J. P. 437	86, 87

B.

Baddeley *v.* Gingell	1 Ex. 319	65, 71, 73, 75, 76
Bailey *v.* Edwards	4 B. & S. 761	537
Baillie *v.* Mogdigliani	Park. on Insurance, ch. ii. 8th ed. p. 116	621
Banks *v.* Crossland	Law Rep. 10 Q. B. 97	462
Bannister *v.* Breslauer	Law Rep. 2 C. P. 497	271
Barker *v.* Hodgson	3 M. & S. 267	248
Barnes *v.* Chapin	4 Allen, 444	81
Barnes *v.* Ward	9 C. B. 392	317
Barnett *v.* London and North Western Railway Company	5 H. & N. 604	667
Barrell, Ex parte	Law Rep. 10 Ch. 512	719
Barret *v.* Dutton	4 Camp. 333	248
Bartlett *v.* Smith	11 M. & W. 483	533
Bartonshill Coal Company *v.* Reid	3 Macq. 266	257
Bate *v.* Cartwright	7 Price, 540	193
Bateman *v.* Boynton	Law Rep. 1 Ch. 359	169
Bates *v.* Winstanley	4 M. & S. 429	156
Batty *v.* Marriott	5 C. B. 818, 827	190
Beckham *v.* Drake	2 H. L. C. 579	148, 150, 151
Begbie *v.* Phosphate Sewage Company	Law Rep. 10 Q. B. 491	679
Belcher *v.* Magnay	13 M. & W. 815, n.	638, 639
Belfast and Ballymena Railway *v.* Keys	9 H. L. C. 556	534
Bell *v.* Carstairs	14 East, 374	106
Bellairs *v.* Bellairs	Law Rep. 18 Eq. 510	281

		PAGE
Bellamy *v.* Majoribanks	7 Ex. 389	33
Benecke *v.* Frost	1 Q. B. D. 419	647, 655
Bettini *v.* Gye	1 Q. B. D. 183	411
Biccard *v.* Shepherd	14 Moo. P. C. 471	106
Birkett *v.* Willan	2 B. & Ald. 356	516
Blyth *v.* Lafone	1 E. & E. 435	748, 750, 751, 752, 753
Bodenham *v.* Bennett	4 Price, 31	304
——— *v.* Purchase	2 B. & Ald. 39	182, 183
Bode's, Baron de, *v.* Reg.	8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 468	490, 496
Bondrett *v.* Hentigg	Holt, N. P. 149	106
Bone *v.* Eckless	5 H. & N. 925	295
Bonomi *v.* Backhouse	9 H. L. C. 503	322, 325, 327
Bosley *v.* Davies	1 Q. B. D. 84	93
Boulton *v.* Jones	2 H. & N. 564	350
Bourne, Ex parte	2 De G. & J. at p. 141	146
Bowditch *v.* Wakefield Local Board	Law Rep. 6 Q. B. 567	70
Bowes *v.* Foster	2 H. & N. 779	292, 297, 298
Boydell *v.* Drummond	11 East, 142	586, 587
Bradford *v.* Williams	Law Rep. 7 Ex. 259	186
Bradshaw *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 C. P. 189	603, 604, 605, 607
Braunstein *v.* Accidental Death Insurance Company	1 B. & G. 782	572
Bristow *v.* Whitmore	9 H. L. C. 391	711
British and American Telegraph Company *v.* Albion Bank	Law Rep. 7 Ex. 119	739
Brown *v.* Arundell	10 C. B. 54	211, 213, 215
——— *v.* Johnson	10 M. & W. 331	247, 249
——— *v.* Shevill	2 Ad. & E. 138	211
——— *v.* Tibbits	11 C. B. (N.S.) 855	461, 462, 463, 468
Buxendin *v.* Sharp	2 Salk. 662	81

C.

Cadaval, Duke of, *v.* Collins	4 A. & E. 858	722
Caledonian Railway Company *v.* Sprott	2 Macq. 449	240
Capel *v.* Powell	17 C. B. (N.S.) 743	438
Carlon *v.* Ireland	5 E. & B. 765	33
Casson *v.* Roberts	31 Beav. 613	714, 719, 720, 724
Castellain *v.* Thompson	13 C. B. (N.S.) 105	369, 373
Castro *v.* Murray	Law Rep. 10 Ex. 213	499, 500, 502, 503
Chapple *v.* Durston	1 C. & J. 1	462, 469
Chinnock *v.* Sainsbury	6 Jur. (N.S.) 1318	711
Chippendale *v.* Lancashire and Yorkshire Railway Company	21 L. J. (Q.B.) 22	534
Chippendall *v.* Tomlinson	4 Dougl. 318; 1 Co. Bank. Law, 8th ed. 428	147, 148, 150
City Discount Company *v.* McLean	Law Rep. 9 C. P. 692, 698	182
Clare *v.* Reg.	Not reported	387
Clayton's Case	1 Mer. 605, 608	182, 183
Clifford *v.* Watts	Law Rep. 5 C. P. at p. 586	260
Cocking *v.* Ward	1 C. B. 858	287, 289, 290, 718
Coggs *v.* Bernard	2 Ld. Raym. 909; 1 Sm. L. C. 188, 7th ed.	529

		PAGE
Commins *v.* Scott	Law Rep. 20 Eq. 11	718
Cooke *v.* Cooke	Law Rep. 4 Eq. 78, 85	595
Cook *v.* Jennings	7 T. R. 381	621
Corbett *v.* Packington	6 B. & C. 268	81
Cork Distilleries Company *v.* Southern and Western Railway Company	Law Rep. 7 H. L. 269	631
Cornish *v.* Abington	4 H. & N. 549	722
Cory *v.* Thames Ironworks Company	Law Rep. 3 Q. B. at p. 186	276
Cotton *v.* Thurland	5 T. R. 405	193
Cox *v.* Burbidge	13 C. B. (N.S.) 430	81
Croasdill *v.* Ratcliffe	5 L. T. (N.S.) 834	7, 8
Crofton *v.* Poole	1 B. & Ad. 568	147
Crosier *v.* Tomkinson	Barnes, 472; 2 Ld. Ken. 439	213, 214, 216
Cubitt *v.* Porter	8 B. & C. 257	240, 243
Cuckson *v.* Stones	1 E. & E. 248	411

D.

D'Arc *v.* London and North Western Railway Company	Law Rep. 9 C. P. 325	517
Danube Railway Company *v.* Xenos	11 C. B. (N.S.) 152; 13 C. B. (N.S.) 825	634
Davidson *v.* Burnand	Law Rep. 4 C. P. 117	106
Davies *v.* Stainbank	6 D. M. & G. 679, 689	537, 673
Davis *v.* Garrett	6 Bing. 716	304, 534
Dawkins *v.* Lord Paulet	Law Rep. 5 Q. B. 94	501
——— *v.* Lord Rokeby	Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744	499, 500, 502
Dawson *v.* Fitzgerald	Law Rep. 9 Ex. 7; 1 Ex. D. 257	579, 584
Dean *v.* Byrnes	3 Moo. P. C. (N.S.) 92	712
Degg *v.* Midland Railway Company	1 H. & N. 773	253, 254, 256, 257
Dennis *v.* Tovell	Law Rep. 8 Q. B. 10	546, 547, 548
Denton *v.* Strong	Law Rep. 9 Q. B. 117	751
Depree *v.* Bedborough	4 Giff. 479	719
Dewhurst, Ex parte	Law Rep. 7 Ch. 185	147, 148, 150, 151
Dickenson *v.* Davis	1 Str. 480	436
Dickins *v.* Marshal	Cro. Eliz. 330	688
Dixon *v.* London Small Arms Company	Law Rep. 10 Q. B. 130	395
——— *v.* Sadler	5 M. & W. 405; 8 M. & W. at p. 898	124, 378
Dobson *v.* Droop	Mood. & M. 441, 443; 4 C. & P. 112	246
Doe *d.* Hornby *v.* Glenn	1 A. & E. 49	602
——— *d.* Humphreys *v.* Roberts	5 B. & Ald. 411	71
——— *v.* Martin	13 M. & W. 811	638, 639
Dolph *v.* Ferris	7 W. & Serg. (Pennsylvania) 367	80, 83
Douglas *v.* Scougall	4 Dow. at p. 276	109
Drummond *v.* Drummond	Law Rep. 2 Ch. 32	406, 408
Dudgeon *v.* Pembroke	Law Rep. 9 Q. B. 581	97, 104
Duff *v.* Budd	3 B. & B. 177	305
Duncan *v.* Findlater	6 Cl. & F. 894	528, 529
Dunn *v.* Hill	11 M. & W. 470, at p. 474	667, 668

E.

		PAGE
Eley, Isle of, The	10 Co. Rep. 141, a,	227, 233
Elliott *v.* Royal Exchange Assurance Company	Law Rep. 2 Ex. 237	579, 584
Ellis *v.* Loftus Iron Company	Law Rep. 10 C. P. 10.	80
Ellis *v.* Turner	8 T. R. 531	304
Ellis *v.* Sheffield Gas Company	2 E. & B. 767	322, 323
Eltham *v.* Kingsman	1 B. & Ald. 683	194, 195, 197
Elton *v.* Larkins	5 C. & P. 392; 8 Bing. 198	510
Emery *v.* Richards	14 M. & W. 728	194
Engelback *v.* Nixon	Law Rep. 10 C. P. 645	146, 149, 151
Evans *v.* Jones	2 B. & S. 45	251

F.

Farmer *v.* Russell	1 B. & P. 296	292
Fawcus *v.* Sarsfield	6 E. & B. 192	105, 112, 114, 119, 121
Fearon *v.* Mitchell	Law Rep. 7 Q. B. 690	60
Feather *v.* Reg.	6 B. & S. 257	384, 387, 388, 389, 390, 391, 392, 393, 394, 396, 399, 400, 401, 402, 490
Fenner *v.* London and South Eastern Railway Company	Law Rep. 7 Q. B. 767	143, 144
Fenwick *v.* Schmalz	Law Rep. 3 C. P. 313.	247
Findon *v.* McLaren	6 Q. B. 891	211
Firebrass *v.* Pennant	2 Wills. at p. 255	441
Fisher *v.* Cox	16 L. T. (N.S.) 397	251
Fitzhardinge *v.* Gloucester Canal Company	Law Rep. 7 Q. B. 776	698, 699, 700
Fitzherbert *v.* Mather	1 T. R. 12	510, 511, 513
Fitzpatrick *v.* Kelly	Law Rep. 8 Q. B. 337.	88
Fivaz *v.* Nicholls	2 C. B. 501	297
Fletcher *v.* Rylands	Law Rep. 3 H. L. 330	317, 318, 322
Ford *v.* Cotesworth	Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544	246
Foreman *v.* Canterbury	Law Rep. 6 Q. B. 214.	39, 40
Francesco *v.* Massey	Law Rep. 8 Ex. 101	271
Francis *v.* Cockrell	Law Rep. 5 Q. B. 184, 501	318, 383
——— *v.* Dodsworth	4 C. B. at p. 220	462, 464, 467, 468, 469
Freedom, The	Law Rep. 3 P. C. 594.	377
Freeman *v.* Cooke	2 Ex. 654, at p. 663	530, 673
Friends, The	Edw. Ad. Rep. at pp. 247–8	635
Frost *v.* Knight	Law Rep. 7 Ex. 111	634

G.

Gallin *v.* London and North Western Railway Company	Law Rep. 10 Q. B. 212	517
Garbutt *v.* Fawcus	1 Ch. D. 155	130
Garnett *v.* Willan	5 B. & A. 53	304
Gee *v.* Liddell	35 Beav. 629	462, 464, 467
Genery *v.* Fitzgerald	Jac. 468	281
Gibson *v.* Small	16 Q. B. 128; 4 H. L. C. 353	104, 107, 110, 116, 121, 123, 124, 125, 126, 381
Gill *v.* Manchester Railway Company	Law Rep. 8 Q. B. 186.	517

	PAGE
Gisbourn *v.* Hurst	1 Salk. 249 . . . 211
Gladstone *v.* King	1 M. & S. 35 507, 510, 511, 513, 514
Goodtitle *v.* Edmonds	7 T. R. 635, 640 . 687, 689
Gott *v.* Gandy	2 E. & B. 845 . 239, 242
Graham *v.* Thompson	Ir. Rep. 2 C. L. 64 . . 196
Gratitudine, The	3 Rob. Adm. 240 . . 625
Graves *v.* Legg	9 Ex. 709 . . 186, 188, 411
Gray *v.* Pearson	Law Rep. 5 C. P. 568. . 48
—— *v.* Pullen	5 B. & S. 970, 981 .. 322, 323, 327, 528
Great Western Railway Company *v.* Redmayne	Law Rep. 1 C. P. 329 . 276, 277
Greene *v.* Cole	2 Notes Saund. 656 . . 701
Greenough *v.* McClelland	2 E. & E. 424 . . 542
Grose *v.* West	7 Taunt. 39 . . . 168

H.

Hadley *v.* Baxendale	9 Ex. 341 . . . 276
——— *v.* Taylor	Law Rep. 1 C. P. 53 . . 317
Hallen *v.* Runder	1 C. M. & R. 266, 275 .. 700, 701, 702
Hall *v.* Wright	E. B. & E. 746 . . 260
Hanbury *v.* Cockerell	1 Roll. Abr. 805, 836 .. 687, 688, 691
Hardman *v.* Booth	1 H. & C. 803 348, 349, 350, 353, 354, 360
Harper *v.* McCarthy	2 B. & P. (N.R.) 258, 267 . 249
Harris *v.* Quine	Law Rep. 4 Q. B. 653. . 491
—— *v.* Ryding	5 M. & W. 60, 71 . . 240
Harrison *v.* Seymour	Law Rep. 1 C. P. 518 . . 673
——— *v.* Turner	10 Q. B. 482 . . 461, 462
Harvey *v.* Aston	1 Atk. 361 . . . 280
Hastelow *v.* Jackson	8 B. & C. 221, 226 193, 195, 197, 295, 296
Havelock *v.* Geddes	10 East, 536 . . . 381
Hayward *v.* Metropolitan Railway Company	4 B. & S. 787. . . 698
Heath *v.* Lewis	3 D. M. & G. 954 . . 280
Henderson *v.* Stephenson	Law Rep. 2 H. L., Sc. 470 515, 516, 521, 522, 528, 529, 531, 532
Henley *v.* Mayor of Lyme Regis	5 Bing. 91, 100, 108, 113; 1 Bing. (N.C.) 222 . 227
Hibbs *v.* Ross	Law Rep. 1 Q. B. 534 . 432
Higgons *v.* Burton	26 L. J. (Ex.) 342 . . 350
Hinton *v.* Dibbin	2 Q. B. 646 . . 309, 516
Hodgson *v.* Johnson	E. B. & E. 685 . 284, 287, 290
Hodson *v.* Terrill	1 Cr. & M. 797 . 192, 193
Hole *v.* Sittingbourne Railway Company	6 H. & N. 488 . 317, 322, 323
Hollier *v.* Eyre	9 Cl. & F. 1, 45 . . 537
Hollingworth *v.* Brodrick	7 A. & E. 40 . . 108, 123
Hollins *v.* Fowler	Law Rep. 7 Q. B. 616; Law Rep. 7 H. L. 757 . 350, 354
Holman *v.* Johnson	Cowp. 341, 343 . . 297
Holmes *v.* North Eastern Railway Company	Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123 253, 254, 255, 256, 257
Hood *v.* Lord Barrington	Law Rep. 6 Eq. 218 . . 719
Hooper *v.* Hooper	30 L. J. (P. M. & A.) 49 . 438
Horne *v.* Midland Railway Company	Law Rep. 7 C. P. 583; Law Rep. 8 C. P. 131 . . 276

		PAGE
Horton *v.* Sayer	4 H. & N. 643	584, 592, 593, 596, 598
Horwood *v.* Smith	2 T. R. 750	348, 351, 352, 356, 357, 358, 359, 361
Hotham *v.* East India Company	1 T. R. 638	581
Howitt *v.* Manfull	6 E. & B. 736	219
Huber *v.* Steiner	2 Bing. (N.C.) 202	491
Hunter *v.* Prinsep	10 East, 378	622, 630, 633

I.

India, Chartered Bank of, *v.* Rich	4 B. & S. 73	425
Ingate *v.* Austrian Lloyd's Company	4 C. B. (N.S.) 704	405, 406, 409
Ionides *v.* Universal Marine Insurance Company	14 C. B. (N.S.) 259	106

J.

Jackson *v.* Noble	2 Keen, 590	687, 688, 690, 692
——— *v.* Smithson	15 M. & W. 563	83
——— *v.* Union Marine Insurance Company.	Law Rep. 10 C. P. 125	186, 414
Jenkins *v.* Heycock	8 Moo. P. C. 351	125
Johnson, Ex parte	3 B. & S. 947	560
Johnson *v.* Great Southern and Western Railway Company	Ir. Rep. 9 C. L. 108	516
Jones *v.* St. John's College	Law Rep. 6 Q. B. 115	260
Joule *v.* Jackson	7 M. & W. 450	213

K.

Karnack, The	Law Rep. 2 A. & E. 289	369
Keighley's Case	10 Co. Rep. 139a, 140b	227, 231
Kelly *v.* Webster	12 C. B. 283	287
Kemp *v.* Rose	1 Giff. 258	580
Kingchurch *v.* People's Garden Company	1 C. P. D. 45	130
Kingston's, Duchess of, Case	2 Sm. L. C., 5th ed. 656	602, 603, 606
Kish *v.* Cory	Law Rep. 10 Q. B. 553	271
Knight *v.* Gravesend Waterworks Company.	2 H. & N. 6	239

L.

Lee *v.* Riley	18 C. B. (N.S.) 722	80, 81, 83
Leer *v.* Yates	3 Taunt. 387	246, 249
Leroux *v.* Brown	12 C. B. 801	461
Lester *v.* Lazarus	2 C. M. & R. 665	462
Lewis *v.* Baldwin	11 Beav. 153	406, 407, 409
——— *v.* McKee	Law Rep. 4 Ex. 58	516
Liddard *v.* Lopes	10 East, 526	633
Liver Alkali Company *v.* Johnson	Law Rep. 7 Ex. 267; Law Rep. 9 Ex. 338	382

		PAGE
Lloyd *v.* General Iron Screw Colliery Company	3 H. & C. 284	377
—— *v.* Lloyd	2 Sim. (N.S.) 255	281
Lodge *v.* Dicas	3 B. & Ald. 611	180
London and North Western Railway Company *v.* Bartlett	7 H. & N. 400	631
Luke *v.* Lyde	2 Burr. 882; 1 W. Bl. 190	620, 622, 623, 624, 627, 630
Lynn, Mayor of, *v.* Turner	1 Cowp. 86	227
Lyon *v.* Mells	5 East, 12, 428	381, 382, 519, 534

M.

MacAndrew *v.* Chapple	Law Rep. 1 C. P. 643	186
Machu *v.* London and South Western Railway Company	2 Ex. 415	695
Maclaren *v.* Stainton	16 Beav. at p. 285	407
Maddon *v.* White	2 T. R. 159	465
Magnus *v.* Buttemer	11 C. B. at p. 881	127
Maingay *v.* Lewis	Ir. Rep. 3 C. L. 495; in error, Ir. Rep. 5 C. L. 229	544
Malden *v.* Great Northern Railway Company	Law Rep. 9 Ex. 300	143
Martin *v.* Hewson	10 Ex. 737	193, 196, 197
Mason *v.* Haddan	6 C. B. (N.S.) 526	748, 750, 751
May *v.* Burdett	9 Q. B. 101, 112	83
Mayhew *v.* Crickett	2 Sw. 185, 193	274, 276
McIntosh *v.* Great Western Railway Company	2 De G. & Sm. 758; 2 Mac. & G. 74	579, 581
McManus *v.* Lancashire and Yorkshire Railway Company	2 H. & N. 702; 4 H. & N. 327	534
Meaning *v.* Hellings	14 M. & W. at p. 712	193
Mersey Docks *v.* Gibbs	11 H. L. C. 686	528
Metters *v.* Brown	1 H. & C. 686	603
Metropolitan Railway Company *v.* Turnham	14 C. B. (N.S.) 212	698
Michael *v.* Tredwin	17 C. B. 551	107
Midland Railway Company *v.* Pye	10 C. B. (N.S.) 179	437
Millar *v.* Taylor	4 Burr. 2303	389
Mills *v.* Bailey	2 H. & C. 36	752
Milner, Re	5 Q. B. 589	340
Milvain *v.* Perez	3 E. & E. 495	271
Milward *v.* Caffin	2 W. Bl. 1330	222
Montoya *v.* London Assurance Company	6 Ex. 451	106
Moran *v.* Jones	7 E. & B. 523	372
Morland *v.* Cook	Law Rep. 6 Eq. 252	227
Morley *v.* Rennoldson	2 Hare, 570, 579	281
Mullins *v.* Collins	Law Rep. 9 Q. B. 292	88
Muspratt *v.* Gregory	3 M. & W. 677	213

N.

Nazer *v.* Wade	1 B. & S. 728	251
Needham *v.* Rivers Protection and Manure Company	1 Ch. D. 253	130
Nesbitt *v.* Greenwich Board of Works	Law Rep. 10 Q. B. 465	70
Newby *v.* Van Oppen	Law Rep. 7 Q. B. 293	406

		PAGE
Newton *v.* Chorlton	2 Drew. 333	537
—— *v.* Ellis	5 E. & B. 115	39
Nichols *v.* Marsland	Law Rep. 10 Ex. 255	318
Nicholson *v.* Chapman	2 H. Bl. 254	369, 373
Nickling *v.* Heaps	21 L. T. (N.S.) Ex. 754	348, 351, 353, 357, 359
Notara *v.* Henderson	Law Rep. 5 Q. B. 346; Law Rep. 7 Q. B. 225, at p. 230	372, 626
Northumbria, The	Law Rep. 3 A. & E. 6	131, 132
Nugent *v.* Smith	1 C. P. D. 19	382
Nunn *v.* Fabian	Law Rep. 1 Ch. 35	286

O.

Oakeley *v.* Pasheller	4 Cl. & T. 207; 10 Bli. (N.S.) 548	536, 543, 544, 545
Oakford *v.* European Shipping Company	1 H. & M. 182	536, 545
Oates *v.* Brydon	3 Burr. 1895	687, 688, 689, 691
O'Hanlan *v.* Great Western Railway Company	6 B. & S. 484	276
Oriental and Financial Corporation *v.* Overend, Gurney, & Co.	Law Rep. 7 Ch. Ap. 142	542
Oxendale *v.* Wetherell	9 B. & C. 386	346

P.

Parker *v.* Patrick	5 T. R. 175	352
—— *v.* Staniland	11 East, 362	702
Pattinson *v.* Luckley	Law Rep. 10 Ex. 330	287
Pearson *v.* Great Northern Railway Company	Law Rep. 7 Q. B. 785, n.	698
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473	517, 533
Peer *v.* Humphrey	2 A. & E. 495, 499	352
Pendlebury *v.* Greenhalgh	Law Rep. 9 Q. B. at p. 489, n. (1)	40
People's Garden Company, In re	1 Ch. D. 44	130
Perrin *v.* Lyon	9 East, 170	281
Philpott *v.* St. George's Hospital	6 H. L. C. 338	465
Pickard *v.* Sears	6 Ad. & E. 469, 474	147, 149, 151, 297, 673
—— *v.* Smith	10 C. B. (N.S.) 470	317, 322, 323, 327
Plummer *v.* Hedge	24 L. J. (Q.B.) 24	667, 668
Plumstead Board of Works *v.* British Land Company	Law Rep. 10 Q. B. 203	69
Pomfret *v.* Ricroft	1 Saund. 322; Wms. Notes, 569	239, 242, 243
Pooley *v.* Harradine	7 E. & B. 431	542
Potter *v.* Duffield	Law Rep. 18 Eq. 4	714, 718, 720
—— *v.* Faulkner	1 B. & S. 800	253, 256, 257
—— *v.* Metropolitan District Railway Company	3 L. T. (N.S.) 765	603
Price *v.* Harris	10 Bing. 331	641
Prince Albert *v.* Strange	2 De G. & S. at p. 695	389
Proudfoot *v.* Montefiore	Law Rep. 2 Q. B. 511	510, 511, 513
Pugh *v.* Jenkins	1 Q. B. 631	190

Q.

		PAGE
Quarman *v.* Burnett	6 M. & W. 499, 510	316

R.

Randall *v.* Lynch	2 Camp. 352, 356	246, 247, 248, 249
Readhead *v.* Midland Railway Company	Law Rep. 2 Q. B. 434	381, 383
Rees *v.* Berrington	2 Ves. 540; 2 Wh. & T. L. C. 4th ed. 974	672, 673, 674, 677
Reeve *v.* Davies	1 Ad. & E. 312	432
Reg. *v.* Albert Smith	15 L. T. (N.S.) 178	208
—— *v.* Anderson	2 Q. B. 740	340
—— *v.* Ashton	1 E. & B. 286	88
—— *v.* Backhouse	Law Rep. 2 Q. B. 16, 17	339, 341
—— *v.* Bamber	5 Q. B. 279	227, 706
—— *v.* Biggleswade Union	21 L. T. (N.S.) 494	505, 506
—— *v.* Birmingham	10 Q. B. 116	157, 160
—— *v.* Boteler	4 B. & S. 959	204
—— *v.* Buttery	Cited 4 B. & Ald. at p. 179	22
—— *v.* Cavendish	12 Ir. Law Rep. 230	483, 484, 485
—— *v.* Cheltenham	1 Q. B. 467	177
—— *v.* Cross	19 L. T. 35	339, 342
—— *v.* Darbyshire	7 Q. B. 193	560
—— *v.* Farrer	Law Rep. 1 Q. B. 558	200
—— *v.* Francis	Law Rep. 2 C. C. 128	22
—— *v.* Gill	2 B. & Ald. 204	741
—— *v.* Heanor	6 Q. B. 745	200
—— *v.* Hines	80 Central Criminal Court Papers, 309	28, 29
—— *v.* Holmes	Dears. Cr. C. 207	18
—— *v.* Hornsea	Dears. & P. Cr. C. 291	706, 707
—— *v.* Hurry	76 Central Criminal Court Sessions Paper, 63	28, 29
—— *v.* Jones	1 Den. Cr. C. 551	22
—— *v.* Justices of Devon	1 M. & S. 411	660
—— *v.* Justices of Lancashire	8 B. & C. 593	560, 561, 562
—— *v.* Justices of Salop	2 B. & Ad. 145	560
—— *v.* Latimer	15 Q. B. 1077	482
—— *v.* Leigh	10 Ad. & E. 398	228
—— *v.* Lofthouse	Law Rep. 1 Q. B. 439	341, 343
—— *v.* Middleton	1 E. & E. 98	560
—— *v.* New Sarum	7 Q. B. 941	155
—— *v.* Overseers of Vange	3 Q. B. 242	228
—— *v.* Owens	2 E. & E. 86	340
—— *v.* Paul	2 Mood. & Rob. 307	706
—— *v.* Pembleton	Law Rep. 2 C. C. 119	24
—— *v.* Pritchard	1 C. & P. 303	450
—— *v.* Rand	Law Rep. 1 Q. B. 230	176, 177
—— *v.* Rowley	3 Q. B. 143; 6 Q. B. 668	220
—— *v.* Smith	Dears, J. P. Cr. C. 559	355
—— *v.* Stephens	Law Rep. 1 Q. B. 702	317
—— *v.* Stevenson	3 F. & F. 106	14
—— *v.* Sturge	3 E. & B. 734	200
—— *v.* Thalman	Leigh & Cave, Cr. C. 326	18
—— *v.* Wagstaffe	10 Cox, Cr. C. 530	29
—— *v.* Warton	2 B. & S. 719	228
—— *v.* Watson	2 Cox, Cr. C. 376	18

	PAGE
Reg. *v.* Watson	2 Ld. Raym. 856; 1 Salk. 356 317, 319, 320
—— *v.* Watts	2 Ld. Raym. 856; 1 Salk. 356. 317
—— *v.* Wavell	1 Doug. 116 . . 222, 224
—— *v.* Webb	1 Den. Cr. C. 338 . . 18
—— *v.* Welman	Dears. Cr. C. 188 . . 22
—— *v.* West Riding Justices	Law Rep. 5 Q. B. 33 . 49, 51, 52
—— *v.* White	Law Rep. 2 Q. B. 557. . 340
Reid *v.* Langlois	1 Mac. & G. 627 . . 140
Remington *v.* Stevens	2 Str. 1271 . 462, 463, 464, 469
Rex *v.* Commissioners of Essex	1 B. & C. 477 . . 227
—— *v.* Commissioners of Pagham	8 B. & C. 355 . . 227
—— *v.* Commissioners of Somerset	8 T. R. 312 . . . 227
—— *v.* De Berenger	3 M. & S. 67 . 739, 743, 744, 745
—— *v.* Dixon	3 M. & S. at p. 15 . . 745
—— *v.* Dyson	7 C. & P. 305 (n.) . . 450
—— *v.* Hevey	1 Lea. Cr. C. 232 . . 21
—— *v.* Huet	2 Lea. Cr. C. 820 . . 22
—— *v.* T. Jones	1 Lea. Cr. C. 452 (n.) . . 448
—— *v.* Medley	6 C. & P. 292 . . 317
—— *v.* Plumer	Russ. & Ry. 264 . . 22
—— *v.* Seward	1 Ad. & E. 706 . . 741
—— *v.* Steel	1 Lea. Cr. C. 451 . 448, 449
Richards *v.* Morgan	4 B. & S. 641 . . 140
Richardson *v.* Willis	Law Rep. 8 Ex. 69 . . 483
Rider *v.* Smith	3 T. R. 766 . . 239
Robinson *v.* Davison	Law Rep. 6 Ex. 269 . 186, 261
Robinson *v.* Great Western Railway Co.	35 L. J. (C.P.) 123 . . 517
Robinson *v.* Mearns	6 D. & R. 26 . . 190
Roe *v.* Holmes	2 Wils. 80 . . 687
Rogers *v.* Hunter	Mood. & M. 63, 65 . . 246
Rooke's Case	5 Co. Rep. 99 b. . . 227
Roper *v.* Lendon	1 E. & E. 825, 850 . . 594
Ross *v.* Fedden	Law Rep. 7 Q. B. 661 . 240
Ross *v.* Gibbs	Law Rep. 8 Eq. 522 . . 143
Rouse *v.* Meier	Law Rep. 6 C. P. 212, at p. 217 750, 752, 754
Rushworth, Ex parte	23 L. T. (N.S.) 120 . . 51

S.

Sale *v.* Lambert	Law Rep. 18 Eq. 1 714, 718, 719, 720
Samuell *v.* Howarth	3 Mer. 272, 279 . 672, 674
Sanderson *v.* Graves	Law Rep. 10 Ex. 234. . 287
Savage *v.* Madder	36 L. J. (Ex.) 178 . . 196
Scaife *v.* Tobin	3 B. & Ad. 523 . . 371
Scattergood *v.* Sylvester	15 Q. B. 506 . 351, 352, 357, 360
Schilizzi *v.* Derry	4 E. & B. 873 . 618, 631
Scott *v.* Avery	5 H. L. C. 811 575, 578, 579, 584, 588, 592, 593, 594, 595, 596, 598
—— *v.* Corporation of Liverpool	3 De G. & J. 334, 360 . 595
Searle *v.* Laverick	Law Rep. 9 Q. B. 122 . 318
Sharrock *v.* London and North Western Railway Company	1 C. P. D. 70, 76 . . 256
Sheehy *v.* Professional Life Assurance Co.	3 C. B. (N.S.) 597 . . 406
Simmons *v.* Taylor	2 C. B. (N.S.) 528; 4 C. B. (N.S.) 463 . . 34
Simpson *v.* Bloss	7 Taunt. 246 . 292, 295, 297, 299

		PAGE
Simpson *v.* Crippin	Law Rep. 8 Q. B. 14	346, 411
——— *v.* Denby	8 C. B. (N.S.) 433	168
Simson *v.* Ingham	2 B. & C. 65	180, 181, 183
Skinner *v.* Great Northern Railway Co.	Law Rep. 9 Ex. 298	143
Sleat *v.* Fagg	5 B. & A. 342	304
Smith *v.* Bickmore	4 Taunt. 474	193
——— *v.* Daniell	Law Rep. 18 Eq. 649	143
——— *v.* Surman	9 B. & C. 561	702
——— *v.* Union Bank of London	Law Rep, 10 Q. B. 291	31
——— *v.* Wigley	3 Moore & Scott, at pp. 179, 180	182
Sneesby *v.* Lancashire & Yorkshire Railway Company	Law Rep. 9 Q. B. 263	42
Soblomsten, The	Law Rep. 1 A. & E. 293	619, 633, 634
Spears *v.* Hartly	3 Esp. 81	462
Stanton *v.* Richardson	Law Rep. 7 C. P. 421; Law Rep. 9 C. P. 390	381
Stedman *v.* Smith	8 E. & B. 1	243
Steel *v.* Prickett	2 Stark. 463	168
Steel's Case	1 Lea. Cr. C. 451	449
Stewart *v.* London and North Western Railway Company	3 H. & C. 135	516, 522
St. Mary, Islington, *v.* Barrett	Law Rep. 9 Q. B. at p. 283	71
Sutton *v.* Temple	12 M. & W. 52	239
Swansea Shipping Company *v.* Duncan	1 Q. B. D. 644	655
Sweet *v.* Lee	3 M. & G. 452	719
Sydserff *v.* Reg.	11 Q. B. 245	741
Symes *v.* Hughes	Law Rep. 9 Eq. 475, 479	296, 297

T.

Tapscott *v.* Balfour	Law Rep. 8 C. P. 46	247
Tarry *v.* Ashton	Law Rep. 1 Q. B. D. 314	329
Taylor *v.* Caldwell	3 B. & S. 826	260, 261
——— *v.* Chester	Law Rep. 4 Q. B. 309	292
——— *v.* Greenhalgh	Law Rep. 9 Q. B. 487	38
Tetley *v.* Wanless	Law Rep. 2 Ex. 275	667
Teutonia, The	Law Rep. 3 A. & E. at p. 421	636
Thomas *v.* Reg.	Law Rep. 10 Q. B. 31, 43	491
Thompson *v.* Charnock	8 T. R. 139	572
——— *v.* Hopper	6 E. & B. 172; E. B. & E. 1038	104, 107, 108, 116, 119, 120, 121, 124, 125, 126, 378
Thomson *v.* Mashiter	1 Bing. 283	211
Tilley *v.* Thomas	Law Rep. 3 Ch. Ap. 61	186, 411
Tobin *v.* Reg.	14 C. B. (N.S.) 505	491
Tomlinson *v.* Goatly	Law Rep. 1 C. P. 230	418
Townshend *v.* Stangroom	6 Ves. 328	462
Tredwen *v.* Holman	1 H. & C. 72	576, 579, 584, 592, 595, 596
Turner *v.* Brookes	10 A. & E. 47	437

V.

Van Toll *v.* South Eastern Railway Co.	12 C. B. (N.S.) 75	516
Varney *v.* Hickman	5 C. B. 271	195, 196, 197
Villeboisnet *v.* Tobin	Law Rep. 4 C. P. 184	418
Vlierboom *v.* Chapman	13 M. & W. 230	623, 630, 632
Vynior's Case	8 Rep. 81b	754

W.

		PAGE
Wakefield Local Board *v.* West Riding and Grimsby Railway Company	Law Rep. 1 Q. B. 84	177
Walker *v.* Clements	15 Q. B. 1046	462
Walton *v.* Waterhouse	2 Wms. Saund. 421 a, n. 6th ed.	260
Warrick *v.* Queen's College, Oxford	Law Rep. 4 Eq. 254	139
Wason, Ex parte	Law Rep. 4 Q. B. at p. 575	203
Watkins *v.* Watson	3 D. J. & S. 434	688, 692
Watson *v.* Ambergate Railway Company	15 Jurist, 448	276
Watts *v.* Shuttleworth	7 H. & N. 353	673
Webb *v.* Grace	2 Ph. 701	280, 281
Wells *v.* Malbon	31 Beav. 48	438
Wenman *v.* Ashe	13 C. B. 836, 844	437
Westbrooke *v.* Strutville	1 Str. 79	436
Westman *v.* Actiebolaget, &c., Fabrik	Weekly Notes, 1876, p. 98	406
Whitchurch *v.* Fulham	Law Rep. 1 Q. B. 233	683, 684
White *v.* Spettigue	13 M. & W. 603	353
Wilkie *v.* Geddes	3 Dow. at p. 60	110
Williams *v.* Adams	2 B. & S. 312	7
——— *v.* Chambers	10 Q. B. 337	147, 149, 150
——— *v.* Everett	14 East, 582	494
——— *v.* Fry	1 Vent. 199	281
——— *v.* Holmes	8 Ex. 861	211, 213
——— *v.* Moore	11 M. & W. 256	465
Wilson *v.* Lloyd	Law Rep. 16 Eq. 60, 70	544
——— *v.* Newport Dock Company	Law Rep. 1 Ex. 177	276
Woodger *v.* Great Western Railway Co.	Law Rep. 2 C. P. 318.	276
Woolf, Ex parte	H. T. 1871, not reported	204
Worms *v.* Storey	11 Ex. 427	377
Wulff *v.* Jay	Law Rep. 7 Q. B. 756.	672, 675
Wyatt *v.* Harrison	3 B. & Ad. 871	323
Wyld *v.* Pickford	8 M. & W. 443	516

Y.

York, Newcastle, and Berwick Railway Company *v.* Crisp	14 C. B. 527	516
Young *v.* Davis	2 H. & C. 197	39

Z.

Zunz *v.* South Eastern Railway Company	Law Rep. 4 Q. B. 539	516

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

AND BY THE

COURT FOR CROWN CASES RESERVED

XXXIX VICTORIA.

COULBERT, APPELLANT; TROKE, RESPONDENT. 1875 *Nov.* 10.

Sale of Intoxicating Liquors—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 10—"*Bonâ fide Traveller*"—"*Nearest Public Thoroughfare*"—*Navigable Arm of Sea.*

The appellant was convicted of having supplied refreshment at prohibited hours to persons not being bonâ fide travellers.

By s. 10 of 37 & 38 Vict. c. 49, "A person shall not be deemed a bonâ fide traveller unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

The appellant's licensed house is on the opposite shore of the Southampton Water from the town, and is distant from the town by water over a mile, and by the nearest road eight miles. There is an ancient ferry from the town appurtenant to appellant's house, and a toll is also paid to him by all persons landing from boats not belonging to him. The persons supplied with refreshment had lodged the night before in the town, and had crossed the water in their own boats:—

Held, that the Southampton Water was a public thoroughfare within s. 10; and the conviction was right.

CASE stated by justices of Hampshire under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the

1875

COULBERT v. TROKE.

appellant, for that the appellant, being a person duly licensed to sell exciseable liquors by retail in his house, situate at, &c., did on the 26th of March, 1875, the same day being Good Friday, at Cracknore Hard, unlawfully open his house for the sale of intoxicating liquors before the hour of half-past twelve on the same day, to wit, at the hour of quarter past eleven, the same not being refreshment to any traveller or to any lodger in the said house, against the tenor of the licence.

By s. 10 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "A person for the purposes of this Act, and the principal Act (35 & 36 Vict. c. 94), shall not be deemed to be a bonâ fide traveller unless the place where he lodged during the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

At the hearing the following facts were either proved or admitted:—

The persons to whom the refreshment was supplied resided and had slept the previous night in the town of Southampton.

The appellant's licensed house is situate at Cracknore Hard, on the western shore of the Southampton Water, and on the opposite shore from Southampton, and is distant from the town of Southampton by water rather over a mile, and by the nearest road eight miles.

From Southampton to Cracknore Hard is an ancient ferry appurtenant to and held with the appellant's house, plied at irregular times by his boats; and a toll is claimed and paid to him by all passengers landing at the Hard from boats not belonging to him.

All persons walking, driving, or riding from the town of Southampton to Cracknore Hard must go round by road, a distance of eight miles.

The persons found in the appellant's house, and supplied by him with refreshment, on the 26th of March, 1875, had crossed the water from Southampton to the house in their own boats.

On the part of the appellant it was contended that the persons to whom refreshment was supplied were bonâ fide travellers, as, unless by crossing the Southampton Water, an estuary of the

1875

COULBERT v. TROKE.

sea, the distance between the two places by the nearest public thoroughfare would very considerably exceed three miles.

But the justices, being of opinion that the persons supplied with refreshment by the appellant, having crossed the water and landed at a ferry with a hard at which the public were entitled to land on payment of a toll, had used a public thoroughfare for the purpose of reaching the appellant's house, convicted the appellant in the mitigated penalty of 10*s.* and costs.

The question of law for the opinion of the Court was, whether persons crossing the Southampton Water in their own private boat, and landing at a ferry at which the public are entitled to land on payment of a toll, have come by a public thoroughfare within the meaning of s. 10 of the Licensing Act, 1874; the appellant's house being also accessible from the town of Southampton by a public highway.

Bullen, for the appellant, contended that the ferry across an arm of the sea was not a public thoroughfare within the meaning of the Act. If this were to be held the nearest thoroughfare, then persons who had travelled all round the eight miles would not be bonâ fide travellers.

The respondent did not appear.

THE COURT (Mellor and Quain, JJ.) were clearly of opinion that "the nearest public thoroughfare," although only for boats, was across the water, and confirmed the conviction.

Judgment for the respondent.

Solicitor for appellant: *J. E. Coxwell.*

1875
Nov. 20.

WALKER, APPELLANT; HORNER, RESPONDENT.

Highway—"Wilful Obstruction"—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 72—*Allowing Trees to grow so as to obstruct Footway.*

12 QBD
122-3,44

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, if any person shall "wilfully obstruct the passage of any footway," he is made liable to a penalty of 40*s*. The respondent was summoned under s. 72, for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:—

Held, by Mellor and Quain, JJ. (Cockburn, C.J., dissenting), that the respondent, in merely suffering the trees to grow so as to be an obstruction, did not "wilfully obstruct" the way within s. 72.

CASE stated by justices of Surrey under 20 & 21 Vict. c. 43.

The respondent was summoned under s. 72 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), at the instance of the Godstone Highway Board, for wilfully obstructing the free passage of a highway—to wit, a bridle way.

During the last year or two the surveyor of the highway board on several occasions complained to the respondent of the obstruction hereinafter mentioned, and called upon him to lop or cut the trees, but he refused to do so, alleging that he did not admit the way to be a public one, and on the 20th of February, 1875, the clerk of the highway board sent him a letter requesting him to remove the obstruction in the Nobright bridle way, which ran through his property in the parish of Godstone, by lopping the trees and underwood, in order that the same might be rendered passable for persons riding along it, and the present inconvenience to foot passengers thereby removed, and stating that, in the event of his not complying with the above request within ten days from the date, the highway board would be compelled to take such proceedings in the matter as they might be advised.

The respondent replied by letter that, as he did not acknowledge the existence of the bridle way alluded to, he was unable to comply with the request of the highway board.

The summons was thereupon issued, and came on for hearing.

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, "If any person shall wilfully ride upon any footpath or causeway, by the side of any road made or set apart for the use or accommodation

of foot passengers, or shall wilfully lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck, or sledge upon any such footpath or causeway, or shall tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon, or shall cause any injury or damage to be done to the said highway, or the hedges, posts, rails, walls, or fences thereof, or shall *wilfully obstruct the passage of any footway*, or wilfully destroy or injure the surface of any highway, or shall wilfully or wantonly pull up, cut down, remove, or damage the posts, blocks, or stones fixed by the surveyor, as herein directed, or dig, or cut down the banks which are the securities and defence of the highways; or break, damage, or throw down the stones, bricks, or wood fixed upon the parapets or battlements of bridges, or otherwise injure or deface the same, or pull down, destroy, obliterate, or deface any milestone or post, graduated or directed post or stone erected upon any highway, or shall play at football or any other game on any part of the said highways, to the annoyance of any passenger or passengers, or if any hawker, higgler, gipsey, or other person travelling, shall pitch any tent, booth, stall, or stand, or encamp upon any part of any highway, or if any person shall make, or assist in making any fire, or shall wantonly fire off any gun or pistol, or shall set fire to or wantonly let off or throw any squib, rocket, serpent, or other firework whatever within fifty feet of the centre of such carriage-way, or cartway, &c. . . . or shall in any way wilfully obstruct the free passage of any such highway, every person so offending shall forfeit and pay any sum not exceeding 40*s.* over and above the damage occasioned thereby."

By s. 65, if the surveyor (of highways) shall think that any carriage way or cart way is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop-ground, house, building, or courtyard of the owner thereof) growing in or near such hedges, or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage way or cart way by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are

1875

WALKER v. HORNER.

growing next adjoining to such carriage way or cart way, to appear before the justices at a special sessions for the highways, to shew cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped in such manner that the carriage way or cart way shall not be prejudiced, &c., or why the obstruction caused in such carriage way or cart way shall not be removed. . . .

By s. 66, no person shall be compelled, nor any surveyor permitted, to cut or prune any hedge at any other time than between the last day of September and the last day of March; and no person shall be obliged to fell any timber trees growing in hedges at any time, except where the highways shall be ordered to be widened or enlarged as herein mentioned, ...

At the hearing evidence was given to the effect following:—

That respondent, in or about the year 1869, purchased a freehold estate formerly called the Nobright, over which estate and adjoining lands the way in question passes.

That in one part of its course the way passes through a wood belonging to the respondent and in his occupation. That the trees and underwood growing on the land of the respondent and in his occupation on each side of the way in question, had of late years so grown over and across the way in places as to be an obstruction to the free passage along the same, and in one place the boughs met so as to render it almost impossible for persons on horseback to pass along it.

The respondent, while not admitting either the right of way or the obstruction as matters of fact, objected at the adjourned hearing, that if the way was a public bridle way and an obstruction thereto had been caused in the manner alleged by the appellant, such obstruction was not a wilful obstruction within the meaning of sect. 72 of the Highway Act, 1835, and that the remedy of the appellant, if the way was a public bridle way and the passage of it was obstructed in the manner alleged, was by indictment or action, or, at all events, not by summary proceedings under the 72nd section of the Highway Act, 1835; and the justices, being of opinion that even if the way were a public bridle way, an obstruction caused by suffering the trees and underwood to grow up or across a public bridle way as alleged was not a

wilful obstruction within the meaning of sect. 72, dismissed the complaint.

The question for the opinion of the Court was, whether the decision of the justices was right in dismissing the complaint on the ground above stated.

Lumley Smith, for the appellant. The way in question being neither a carriage nor a cart way, it was impossible to proceed under s. 65 for the purpose of compelling the respondent to prune or lop the trees. The only question is whether his neglect to prune the trees is a wilful obstruction within s. 72. If he planted trees directly upon the highway, this would be an obstruction, and it can make no difference if he plants trees which must necessarily grow over it. In Chitty's Criminal Law, vol. 3, p. 617, there is a precedent of an indictment for continuing a hedge so as to obstruct a pack and prime way; and it is laid down in Hawkins, Pleas of the Crown, vol. 1, pp. 700, 701, that making a hedge athwart a highway is a public nuisance, also that it is a nuisance to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage. *Williams* v. *Adams* (1) shews that under s. 73 the justices have jurisdiction to try whether the locus in quo is a highway or only an occupation road. The respondent will probably rely on the case of *Croasdill* v. *Ratcliffe* (2), where the occupier of a stable from which rainwater dropped so as to injure a footway by flowing upon and over it, was held not liable to be convicted under s. 72; but the decision only amounted to this, that he was not guilty of "suffering filth, &c., to flow upon the highway" within the meaning of the latter part of the section.

Bulwer, Q.C. (*Athawes* with him), for the respondent. By s. 5 of the Act the word "highways" is to include "bridle ways," and the fact that s. 65 subsequently makes provision for the case of carriage ways being obstructed by trees, and that s. 66 only permits the surveyor to remove the obstruction during a particular season of the year, goes to shew that the case of a bridle way so obstructed was designedly left untouched by the legislature. With regard to the authorities cited by the appellant, the question is

(1) 2 B. & S. 312; 31 L. J. (M.C.) 109. (2) 5 L. T. (N.S.) 834.

6 Jur. N.S. 816

1875

WALKER v. HORNER.

not whether an obstruction by allowing boughs of trees to grow over the highway is indictable, but whether it is the subject of the summary procedure. Sect. 72 makes an elaborate enumeration of different offences, but does not specify this, which in the case of a carriage way is specifically provided for. The case of *Croasdill* v. *Ratcliffe* (1) is undistinguishable. It proceeded upon the ground that there was no "wilful obstruction" within s. 72.

Lumley Smith, in reply.

COCKBURN, C.J. In this case I cannot say that my mind is free from doubt, more especially as my opinion is different from that of my learned Brothers. My own impression is that the case is within s. 72, having regard to the authorities, which establish that if a man allows trees to grow so as to obstruct a highway he is guilty of an indictable offence. Now it is clear that no indictment will lie unless there has been in the eye of the law a wilful obstruction. This is always a necessary ingredient in determining the liability of the person indicted, and I think that the section ought to be construed according to the existing law, and so as to include the case in question. My learned Brothers being of a contrary opinion, there will be judgment for the respondent.

MELLOR, J. I think that our judgment ought to be for the respondent. The class of offences enumerated in s. 72, such as pitching tents or booths upon the highway, firing guns or pistols, or throwing squibs near the centre of a carriage way, or laying lumber or rubbish upon any highway, seems to shew that the section was intended to apply to persons who actively cause an obstruction. I cannot think it was intended to apply to all indictable obstructions, but it seems to me that it is confined to obstructions of the character specified in the section. The fact that in the case of carriage ways obstructed by trees a summary remedy is given strengthens this construction, especially as by s. 66 this summary remedy is restricted to certain seasons of the year. I do not think that we ought to enlarge the words of the section by saying that other offences which are not specified are within them.

(1) 5 L. T. (N.S.) 834.

1875

WALKER v. HORNER.

QUAIN, J. I am of the same opinion. We must look at the class of offences in which, by s. 72, it was intended to give a summary jurisdiction. These offences are, amongst others, "wilfully destroying the surface of any highway, breaking, damaging, or throwing down the parapets of bridges," &c. I think that merely suffering trees to grow over the highway is not a wilful obstruction of the same class as these offences.

Judgment for the respondent.

Solicitor for appellant: *W. A. Head, Jun., for W. A. Head & Sons, East Grinstead.*

Solicitor for respondent: *T. N. Crosse.*

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF CROYDON UNION BY THE UNION ASSESSMENT COMMITTEE, RESPONDENTS, *v.* VERRALL AND ANOTHER, APPELLANTS.

Nov. 13.

Poor-rate—Appeal to Sessions—Right to Production and Proof of Ratepayer's Books of Account—Land occupied as a Racecourse—Evidence.

Upon appeal to sessions against a rate in respect of premises occupied as a racecourse, the respondents have a right to call for the production, and upon non-production, to prove the contents of the appellants' books of account, as an element in ascertaining the rateable value of the occupation.

UPON appeal to the quarter sessions for Surrey against a poor-rate for the parish of Croydon, the Court gave judgment for the appellants, subject to the following case:—

1. The appellants are the occupiers of land in the parish of Croydon, Surrey, in the Croydon Union.

2. The land occupied by the appellants, in respect of the occupation of which the rate appealed against was made, consisted of 119*a.* 3*r.* 27*p.*, of which 101*a.* 3*r.* 30*p.* were used by the appellants as a racecourse, and the residue for agricultural purposes.

3. The part of the land in question occupied as a racecourse is railed off from the other land, and there are erected thereon several stands for the use of persons coming to see the races, a grand stand having accommodation for 2000 persons, and a small stand for 600 persons. The appellants charge prices varying from 7*s.* 6*d.* to 3*s.* 6*d.* to each person using the stands, and the ppellants also, on days on which races are held, let off at vary-

1875

THE QUEEN v. VERRALL.

ing rentals portions of the land to be occupied by refreshment booths, &c. The appellants give stakes and cups to be run for at the race meetings, at some of which the added money amounts to 500*l.*, which is paid by the appellants.

4. The appellants occupy the whole of the land in question as tenants under a lease for ten years from Christmas, 1868, at a rental of 861*l.* 10*s.* Before Christmas, 1868, the appellants had occupied the same land in the same manner, and with similar buildings on it, as tenants under a lease which had not expired before Christmas, 1868, at a rental of about 321*l.* per annum. This lease the appellants surrendered, and obtained the above-mentioned lease for ten years at an annual rental of 861*l.* 10*s.*

5. The following is the entry in the valuation list and in the rate book of the rate appealed against.

		Estimated extent.	Gross estimated rental.	Rateable value.
J. F. Verrall and others.	Land occupied as a race-course, grand stand, refreshment rooms, &c. Woodside.		2200*l.*	2000*l.*

6. On the hearing before the quarter sessions, the appellants called two land surveyors and auctioneers as witnesses, who put the rateable value of the land at 611*l.* These witnesses stated that they arrived at the estimated value of 611*l.* as follows:—81 acres at 3*l.* 10*s.* per acre, 287*l.*; 20 acres at 1*l.* 10*s.* per acre, 30*l.*; 14 acres at 2*l.* 5*s.* per acre, 32*l.*; 2 acres and 12 perches, 2*l.*; homestead and 2 cottages, 60*l.*; total, 411*l.* and 200*l.* in addition, being 10 per cent. on the estimated cost of construction of grand and other stands. They also stated that neither of them had ever before valued a racecourse, and that they had no information as to the receipts of this course and no idea of its profits.

7. The respondents called for the production of the appellants' books of account, shewing the receipts and expenditure in respect of the racecourse, which books the appellants had received due notice to produce. The respondents also proposed to give affirmative evidence of the profits derived from the land used as a racecourse, as being material in ascertaining its present rateable value.

8. The Court of quarter sessions decided that the respondents

were not entitled to call for the production of the books of account, nor to give the affirmative evidence.

9. The quarter sessions being of opinion that the above-mentioned evidence tendered by the respondents was inadmissible, gave judgment for the appellants, disallowing the rate appealed against, and made an order reducing the rate to 1000*l.* gross estimated rental, and 850*l.* rateable value, subject to the opinion of the Court of Queen's Bench as to the admissibility of the above evidence.

If the Court shall be of opinion that the evidence, or any part thereof, was admissible, then the judgment of the quarter sessions and the order based thereon shall be void, and the appeal remitted to the quarter sessions in order that such evidence may be taken.

Thesiger, Q.C. (*Oppenheim* with him), for the appellants. The sessions were right in not admitting the evidence. The appellants' books are not proper materials for ascertaining the rateable value of their premises. The amount of the takings may depend not on the value of the premises, but on the personal skill of the occupier. In the case of an opera house, where the income is derived from the chance attendance of distinguished performers, it would be unfair to take it as the basis of the rateable value of the occupation. The case of a railway is different, for it cannot be presumed that one public body has more skill than another.

[FIELD, J. Allowance might be made for the peculiar skill of the occupier. In the case of the Hull Docks, how could one get at the rateable value without inspecting the books ?]

E. Clarke, for the respondents, was not heard.

PER CURIAM (Cockburn, C.J., and Field, J.). The evidence was improperly rejected. The books of the appellants were clearly elements for the consideration of the justices in arriving at the value of the occupation.

Case remitted accordingly.

Solicitor for appellants: *H. Parry.*

Solicitor for respondents: *A. G. Blake.*

1875
Nov. 17.

SHILLITO, APPELLANT; THOMPSON, RESPONDENT.

Municipal Corporation Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 90—*Bye-laws by Council—Suppression of Nuisance—Victuals unfit for Food—Cheese.*

By s. 90 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76) it is lawful for the council of a borough to make bye-laws, inter alia, for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force in such borough.

A town council of a borough made a bye-law "that if any butcher, or dealer in meat, or any fishmonger, poulterer, or other person, shall expose or offer for sale on his premises, or have in his possession with intent to sell or expose for sale, any meat, fish, poultry, or other victuals or provisions, unfit for the food of man, he shall be subject to a penalty, to be recovered before justices, who shall decide on the unfitness."

The appellant, a grocer, exposed for sale on his premises cheese which the justices held was unfit for food, and convicted him accordingly:—

Held, that to expose for sale, or to have possession of, with intent to sell, things unfit for food, was a nuisance at common law, consequently the bye-law was within the powers of s. 90, and that the appellant was within the bye-law.

CASE stated by justices of Doncaster under 20 & 21 Vict. c. 43.

An information was laid under the Doncaster borough bye-laws by the respondent, the inspector of nuisances to the urban sanitary authority of the borough, against the appellant, a grocer of Doncaster, for that he, on the 9th of August, 1873, unlawfully had in his possession, with intent to sell, certain unwholesome victuals or provisions, to wit, certain cheese, unfit for the food of man, contrary to the bye-laws of the borough.

By s. 90 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76) it is enacted:—

"That it shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences, provided that no fine so to be appointed shall exceed the sum of 5*l.*, and that no such bye-laws shall be made unless at least two-thirds of the whole number of the council shall be present.

Bye-laws for the borough of Doncaster, pursuant to the above section, were made by the town council of the borough of Don-

caster at a special meeting held on the 27th of October, 1852. Bye-law 35 is as follows:—

1875

SHILLITO v. THOMPSON.

"That if any butcher or dealer in meat, or any fishmonger, poulterer, or other person, shall expose or offer for sale in or upon his shop, stall, warehouse, or any part of his premises, or otherwise, within the said borough, or have in his possession, with intent to sell or expose for sale the flesh of any diseased animal, or any unsound, putrid, or unwholesome meat, fish, poultry, or other victuals or provisions unfit for the food of man, or which would be deleterious to the health of persons who might feed thereon (the unfitness or deleteriousness whereof shall be in the decision of the justices adjudicating on the complaint thereof), or shall kill any diseased animal for the purpose of sale for human food, every person so respectively offending shall for such offence forfeit and pay the fine or sum of 20*s*., and for a second, alleged and proved as such, and not committed on the same day as such first offence, shall forfeit and pay the fine or sum of 40*s*., and for every offence being subsequent to a second offence, and alleged and proved as such, and not committed on the same day as any prior offence, shall forfeit and pay the fine or sum of 5*l*., and that it shall be lawful for any constable or police-officer of the said borough to seize and take possession of any such unsound, putrid, or unwholesome meat, fish, poultry, or other victuals or provisions, and take the same before any two justices, and if by them adjudicated to be unfit for human food, to burn or otherwise destroy the same.

The facts proved at the hearing were that, on the 9th of August, 1873, Doncaster market-day, the respondent, in going down a street in Doncaster, was attracted by an offensive smell, which he found was caused by cheese in appellant's passage, which he alleged to be in a putrid state—in his opinion, unfit for human food. The cheese, which weighed ten stone, was exposed for sale, and the respondent seized it. There was evidence that the cheese was unwholesome and unfit for food, and counter evidence was adduced that it was wholesome and fit for human food.

Upon the evidence the justices found as a matter of fact that two of the cheeses were decomposed and unfit for human food, and that the evidence brought the case within bye-law 35; and they ordered these two cheeses to be destroyed, and they adjudged the appellant to pay 10*s*. and costs.

The questions of law raised on behalf of the appellant were, that the cheese was not an article of food within the meaning of the bye-law; that the bye-law was ultra vires, and was not within the scope of the Municipal Corporation Act, s. 90; and that the bye-law was wholly repealed by sanitary Acts since passed.

The points of law for the opinion of the Court therefore are:

1875

SHILLITO v. THOMPSON.

1st. Whether the Doncaster Town Council had power, under s. 90 of 5 & 6 Wm. 4, c. 76, to make the bye-law 35, so as to give it the force and effect of law within the borough of Doncaster. 2ndly. Whether the sanitary Acts subsequently passed have or have not virtually repealed the bye-law—if it ever had the force of law. And 3rdly. Whether cheese is an article of food within the meaning of the bye-law.

If the Court should be of opinion that the conviction was legally and properly made, and the appellant liable as aforesaid, then the conviction was to stand; but if the Court should be of opinion otherwise, then the complaint was to be dismissed.

Lockwood, for the appellant. The evidence was contradictory as to whether the cheese was unfit for human food.

[QUAIN, J. The justices have found as a fact, upon the evidence, that the cheese was unfit for food.]

Secondly, this is no offence within s. 90; that only applies to nuisances. The bye-law is, therefore, ultra vires; and even if the bye-law be good, the appellant was not within it.

[BLACKBURN, J. Why not? It is found as fact that the cheese was exposed for sale for human food, and that is a nuisance at common law. *Reg.* v. *Stevenson* (1), before Willes, J., shews that it is an offence at common law knowingly to send to market for human food meat which is unfit for human food.]

Cheese is not ejusdem generis with meat and the other things mentioned in the bye-law.

The respondent did not appear.

Per CURIAM (Blackburn, Mellor, and Quain, JJ.) The conviction must be affirmed.

Judgment for the respondent.

Solicitor for appellant: *Beldan, for Peagam, Doncaster.*

(1) 3 F. & F. 106.

[CROWN CASE RESERVED.]

1875
Nov. 13.

THE QUEEN *v.* SAUNDERS AND HITCHCOCK.

Nuisance—Indecency—Booth for Indecent Exhibition—Public Place—Indecent Language.

The prisoners were indicted in one count for keeping a booth for the purpose of shewing an indecent exhibition; in a second for shewing for gain an indecent exhibition in a booth; in a third, for shewing an indecent exhibition in a public place. It was proved that during the Epsom races the prisoners, who were travelling showmen, kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who would pay entered and saw an indecent exhibition:—

Held, that the prisoners had committed an indictable offence, and that it was well laid in the indictment.

CASE stated by the chairman of the Surrey quarter sessions.

At the general quarter session of the peace, holden at St. Mary, Newington, in and for the county of Surrey, on Tuesday, the 29th of June, 1875, John Saunders and George Hitchcock were tried on an indictment of which, so far as it is material, the following is a copy:—

"Surrey to wit. The jurors for Our Lady the Queen, upon their oath present that John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the 23rd day of May, in the year of our Lord, 1875, at the parish of Epsom, in the county of Surrey, unlawfully, wickedly, and scandalously did keep and maintain a certain booth, tent, and shed for the purpose of exhibiting and shewing to the sight and view of any person or persons willing and desirous of seeing the same, and paying for their admission into the said booth, tent, and shed, divers lewd, wicked, scandalous, infamous, bawdy, and obscene performances, representations, practices, and figures, and in the said booth, tent, and shed, on the said 23rd day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and scandalously, for lucre and gain, did

1875

THE QUEEN v. SAUNDERS.

exhibit and shew the said performances, practices, representations, and figures, and cause and permit the same to be exhibited and shewn to the sight and view of divers and very many liege subjects of our said Lady the Queen, to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

"Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the said 23rd day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, in a certain booth, tent, and shed there suituate, did unlawfully, wickedly and scandalously exhibit, shew, and cause to be exhibited and shewn, for lucre and gain, to and in the view of divers and very many liege subjects of our Lady the Queen, divers lewd, wicked, scandalous, bawdy, and obscene performances, representations, practices, and figures, to the manifest corruption of the morals as well of youth as of other liege subjects of our Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

"Third count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the 23rd day of May in the year of our Lord 1875, in a certain public place, to wit, Epsom Downs, situate in the parish of Epsom aforesaid, in the county of Surrey aforesaid, unlawfully, wickedly, and scandalously did exhibit and shew, and cause and permit to be exhibited and shewn, for lucre

and gain, to the sight and view of divers liege subjects of our Lady the Queen, in the said public place as aforesaid, there being divers indecent, lewd, filthy, bawdy, and obscence representations, practices, and performances, to wit [describing the exhibition], to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

"Fourth count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being wicked and evil disposed persons, and devising, contriving and intending the morals as well of youths as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires on the 23rd day of May, in the year of our Lord 1875, in the presence and hearing of divers liege subjects of our said Lady the Queen, there assembled together, to wit on Epsom Downs, in the parish of Epsom, in the county of Surrey, unlawfully, wickedly and scandalously did publish, utter, pronounce and declare, and cause and procure to be published, uttered, pronounced and declared the wicked, obscene, filthy and bawdy words and matter following [setting out certain obscene language], to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our said Lady the Queen, her Crown and dignity."

Fifth, sixth, and seventh counts, similar to the first, second, and third, but relating to a subsequent occasion, namely, the 26th of May.

It appeared from the evidence that the prisoners were travelling showmen, pursuing their calling on the Epsom Downs on the 23rd and 26th of May, 1875, during the Epsom summer races, and were the owners and keepers of a booth. On the 23rd and on the 26th of May the prisoners invited various persons to enter their booth, and all who would pay the price charged were admitted. Inside the booth a grossly indecent exhibition took place. It was further proved that on the 23rd the prisoner Saunders used the

1875

THE QUEEN v. SAUNDERS.

indecent language alleged in the 4th count, and on that day and the 26th both prisoners used other indecent language to induce people to go into the booth.

Counsel on behalf of the prisoners objected that they could not be legally convicted:

1st. Upon the 1st, 2nd, 4th, 5th and 6th counts of the above indictment, on the ground that those counts do not disclose an indictable offence at common law.

2nd. Upon the 3rd and 7th counts of the above indictment, on the ground that there was no evidence of an indictable offence at common law by indecency in a public place, the said "booth, tent and shed" not being a public place as alleged in those counts.

The Chairman overruled the objections taken to the above counts, and both the prisoners were convicted on these counts, but judgment was respited for the purpose of taking the opinion of the Court on these objections. If the Court should be of opinion that these objections were valid, the conviction was to be quashed; if not, the conviction was to be affirmed.

Edward Clarke (*Lyall* with him) for the prisoners. The 1st and 2nd, and the 5th and 6th counts of the indictment are bad, because they do not allege any indecency to have been committed in a public place. And the 3rd and 7th counts, which do allege indecency in a public place, were not proved. A booth kept by the prisoners, which the public have no right to enter, and into which no one is admitted except on payment, is not a public place within the meaning of the rule. The fourth count is not good. The mere utterance of indecent language is not a criminal offence.

[He cited *Reg.* v. *Webb* (1); *Reg.* v. *Watson* (2); *Reg.* v. *Thalman* (3); *Reg.* v. *Holmes.* (4)]

Baggallay, for the prosecution, cited 2 Chitty's Crim. Law, p. 48; 2 Strange, p. 789.

The judgment of the Court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) was delivered by

LORD COLERIDGE, C.J. It appears to have been proved that

(1) 1 Den. Cr. C. 338; 18 L. J. (M.C.) 39.
(2) 2 Cox Cr. C. 376.
(3) Leigh & Cave, Cr. C. 326; 33 L. J. (M.C.) 58.
(4) Dears. Cr. C. 207; 22 L. J. (M.C.) 122.

1875

THE QUEEN v. SAUNDERS.

the two prisoners kept on Epsom Downs a booth for the purpose of shewing an indecent exhibition; that they invited all persons who came within reach of their solicitations to come in and see it; and that those who paid went in and did see what was grossly indecent. We think that those facts are abundant to prove a common-law offence; and that it is well stated in the indictment. On this ground the conviction must be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for prisoners: *W. H. Fullager.*

[CROWN CASE RESERVED.]

Nov. 13.

THE QUEEN *v.* COOPER.

Evidence—False Pretences—Advertisement inviting Answers by Letter—Letters at Post Office addressed to Prisoner, but not delivered.

The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shewn at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s.*," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence:—

Held, that, under the circumstances, the letters were rightly received in evidence.

CASE stated by the chairman of the Northampton court of quarter sessions.

The prisoner, George Cooper, was tried on an indictment for

1875

THE QUEEN v. COOPER.

obtaining and attempting to obtain certain moneys, from the persons in the indictment mentioned, by false pretences.

The following is an abstract of the indictment:—

First count. Falsely pretending to Maria Mitchell that certain persons called Davis Brothers were carrying on business at Hardingstone, and were acquainted with a method whereby 2*s.* 6*d.* per hour could be earned by beginners of either sex, by preparing carte-de-visite papers at their own homes at 8*d.* per dozen, and were able to give permanent employment to all who should learn the method by their instruction, whereby the defendant obtained twelve stamps.

Second count. Similar false pretences to John Clarke, whereby the defendant obtained certain stamps.

Third count. Similar false pretences to Ellen Cameron, whereby the defendant attempted to obtain one shilling.

Fourth count. Similar false pretences to Elizabeth Hickson, whereby the defendant attempted to obtain one shilling.

Fifth count. That the defendant, with intent to defraud the Queen's subjects, inserted in the *Daily Telegraph* a fraudulent advertisement, in the words therein mentioned, containing the false statements in the first count mentioned, whereby he obtained sums of money and stamps from the Queen's subjects.

The advertisement was as follows: "Two and sixpence per hour easily earned by beginners (either sex) by preparing carte-de-visite papers, at their own homes, at 8*d.* per dozen. Employment permanent. Trial paper and instructions, 1*s.* Davis Brothers, Hardingstone, Northampton."

On the trial it was proved that the prisoner inserted the said advertisement; that there was no such firm as Davis Brothers at Hardingstone; and that the prisoner was not in a position to give permanent employment.

Six envelopes, each directed as above, containing answer to the advertisement and twelve postage-stamps, were found in the possession of the prisoner on his being apprehended; 281 other letters were produced by the chief clerk of the post office at Northampton in a sealed bag.

These letters had also been addressed to the prisoner under the title of Davis Brothers, Hardingstone, in reply to the said adver-

tisement, and had been received at the office in like manner as those mentioned in the former paragraph, but having been stopped by the post-office authorities before the said letters had been delivered, none of the 281 letters had ever been in the prisoner's possession or custody, nor was any proof adduced that they were written by the persons from whom they purported to come, but each letter had been opened at the post office before production at the trial, and each contained twelve stamps.

The counsel for the prosecution proposed to put the whole of such letters in evidence against the prisoner.

The counsel for the prisoner objected that, the said letters not having been found in the possession of the prisoner, and as their contents were unknown to him, and there was no proof of their authenticity, they could not be adduced in evidence against the said prisoner.

The Court admitted the said letters, two were read, and all the others taken as read. It was proved that when they were opened by the post-office clerk each envelope contained twelve postage-stamps, as when admitted in evidence. The letters, except the said two, were not, in fact, read, but were taken as having been regularly put in, and were commented upon by the counsel for the prosecution.

The jury found the prisoner guilty, and the Court sentenced him to nine months' imprisonment with hard labour, but reserved for the consideration of the justices of either Bench and barons of the Exchequer the question whether the Court ought to have admitted the said letters as evidence against the prisoner.

If the Court should be of opinion that the court of quarter sessions ought to have rejected the said letters as evidence, then the conviction to be quashed; if not, to be affirmed.

Jacques, for the prisoner. The letters were not admissible in evidence, inasmuch as they never reached the hands or were in the possession of the prisoner: *Rex* v. *Hevey*. (1)

[POLLOCK, B. In that case the prisoner had done nothing to invite the letters to be sent.]

There is no evidence of the sending or identity of these letters;

(1) 1 Lea. Cr. C. 232.

1875

THE QUEEN v. COOPER.

the senders ought to have been called: *Rex* v. *Plumer* (1); *Rex* v. *Huet.* (2) If these letters are admissible, the prosecution might always manufacture evidence against a prisoner after he was in custody.

[LORD COLERIDGE, C.J. It has often been held that when a letter is put in course of transmission, the postmaster-general holds it as the agent of the receiver. He referred to *Reg.* v. *Jones* (3); *Reg.* v. *Buttery.* (4)]

Merewether, contrà. If the prisoner had been indicted in respect of any specific one of the letters in question, no doubt the sender ought to have been called; but here it was otherwise. Even apart from the authorities, which shew generally that the postmaster-general is the agent of the person to receive a letter, here the terms of the advertisement expressly make him so: *Reg.* v. *Welman.* (5) The letters are admissible under the first four counts to shew fraudulent intent: *Reg.* v. *Francis.* (6)

[BRAMWELL, B. That case would be the same as this if in this case there had been several advertisements. But how can what happens after the advertisement be evidence of the prisoner's intention in inserting it?]

At any rate the letters must be admissible under the last count. Under that count he might have been convicted of an attempt, and for that they are clearly material.

Jacques replied.

LORD COLERIDGE, C.J. The majority of the Court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) are of opinion that under the circumstances the letters were admissible in evidence.

Conviction affirmed.

Solicitor for prosecution: *A. J. Jeffery, Northampton.*

(1) Russ. & Ry. 264.
(2) 2 Lea. Cr. C. 820.
(3) 1 Den. Cr. C. 551; 19 L. J. (M.C.) 162.
(4) Cited 4 B. & Ald. at p. 179.
(5) Dears. Cr. C. 188; 22 L. J. (M.C.) 118.
(6) Law Rep. 2 C. C. 128.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WELCH.

1875
Nov. 13.

Malicious Injury—Cattle—Malice—Reckless Disregard as to whether Act might injure—24 & 25 Vict. c. 97, s. 40.

On an indictment under 24 & 25 Vict. c. 97, s. 40, for unlawfully and maliciously killing, maiming, and wounding a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, and pushing it into her body. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare; but that he knew what he was doing would or might kill, maim, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not. The jury convicted the prisoner:—

Held, that there was sufficient malice, and that the conviction was right.

CASE stated by Lindley, J.

The prisoner was indicted under 24 & 25 Vict. c. 97, s. 40 (1) for unlawfully and maliciously killing, maiming, or wounding a mare. The indictment contained three counts, viz.:—1, for killing; 2, for maiming; 3, for wounding.

The prisoner was tried at the Old Bailey on the 23rd of September, 1875.

The evidence shewed that the mare in question died by reason of injuries caused by the prisoner. These injuries consisted of a hole in the base of the bladder, and three holes in the large intestines. They were caused by the prisoner inserting the handle of a stable fork into the vagina of the mare and pushing the handle two feet and more into the mare's body and working the fork backwards and forwards in that position. Whilst this was being done the mare put her ears back and stamped her feet, and it was proved that these were signs of pain.

There was no evidence to shew that the prisoner was actuated by any ill-will towards the owner of the mare, nor by any spite towards the mare herself, nor, in fact, by any motive or desire except the gratification of his own depraved tastes.

(1) By 24 & 25 Vict. c. 97, s. 40, "Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony. . . . ."

1875

THE QUEEN v. WELCH.

It was objected by counsel for the prisoner that there was no case for the jury as there was no malice. The learned judge overruled the objection, and having *Reg.* v. *Pembliton* (1) before him, directed the jury to find the prisoner guilty if they were of opinion that either of the two following questions ought to be answered in the affirmative, viz. :—

1. Did the prisoner, in fact, intend to kill, maim, or wound the mare? or, if he did not, then—

2. Did he know that what he was doing would or might kill, maim, or wound the mare, and did he nevertheless do what he did recklessly and not caring whether the mare was injured or not?

The jury answered the first question in the negative, and the second in the affirmative, and the prisoner was found guilty accordingly.

The question for the Court was whether the conviction ought to be quashed or not.

No counsel appeared for the prisoner.

Besley, for the prosecution, was stopped by the Court.

The judgment of the Court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) was delivered by

LORD COLERIDGE, C.J. We are all of opinion that there was malice sufficient to sustain this conviction.

Conviction affirmed.

Solicitor for prosecution: *A. Leslie.*

(1) Law Rep. 2 C. C. 119.

[CROWN CASE RESERVED.]

1875
Nov. 18.

THE QUEEN *v.* ROBERT DOWNES.

Manslaughter—Infant Child—Neglect to provide Medical Aid—Bonâ fide Belief that Medical Aid unnecessary and wrong—31 & 32 *Vict. c.* 122, *s.* 37.

8 Q B D 57

By 31 & 32 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction."

Upon the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of an infant child. The child was ill and wasting for eight or nine months from chronic inflammation of the lungs and pleura, and then died. The prisoner belonged to a sect who never call in medical advice, but call in the elders of their church to pray over the sick person. This course was pursued with the prisoner's child. The prisoner, however, who had no medical skill himself, consulted the person called in to pray over the child, who also had no medical skill, and they thought the child was suffering from teething, and gave it articles of diet which they thought suitable for a child so suffering. The prisoner had sufficient means to procure skilled advice, which was easily obtainable. The jury found on evidence, which, it was to be taken, was sufficient to warrant their findings: first, that the prisoner neglected to procure medical aid for the child when it was in fact reasonable so to do, and when he had the ability; secondly, that the death was caused by that neglect; thirdly, that he bonâ fide, though erroneously, believed that medical aid was not required for the child; fourthly, that he bonâ fide believed that it was wrong to call in medical aid. The learned judge thereupon directed a verdict of guilty to be entered:—

Held, without expressing any opinion as to how the case would have stood at Common Law apart from the above statute, that that statute imposed a positive duty to provide adequate medical aid when necessary, and that that duty having been wilfully neglected by the prisoner, and death having ensued from that neglect, the prisoner was properly convicted of manslaughter.

CASE stated by Blackburn, J.

The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

It appeared on the trial by the evidence that Charles Downes was an infant who, at the time of his death, was a little more than two years old. The child had been ill and wasting away for eight or nine months before its death. The prisoner, who resided at Woolwich, was the father of the deceased, and had during the whole of this time the custody of the child.

1875

THE QUEEN v. DOWNES.

The prisoner was one of a sect who call themselves the Peculiar People. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child and anointed it with oil.

The reason of this course of conduct was explained by George Hurry, who was called as a witness. He stated that the Peculiar People never call in medical advice or give medicines in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the 5th chapter of the Epistle of St. James, and in hope that the cure would follow.

This course was pursued with regard to the deceased infant during its illness. The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething, and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such complaint, all of which were supplied accordingly. There was no evidence that this treatment was mischievous, and though this was probably not logically consistent with the doctrines of his sect as described by him, the learned judge saw no reason to doubt that it was all done in perfect sincerity.

He was asked by the counsel for the prosecution whether if one of their sect met with an accident, such as a broken bone, their principles would prevent their calling in a surgeon to set it, and he answered that he thought they probably would call in a surgeon in such a case, but it had never yet arisen. He was asked whether they trusted to nature in cases of childbirth. He said they did not call in midwives, which would be against their principles, but that several sisters of their persuasion were as skilful as any midwives, and that they assisted the women in labour.

He was further asked whether he had not himself, on the trial of Hurry, before Mr. Justice Byles, promised that in future

medical advice should be called in when necessary. He explained that in that case the disease was infectious, and that he understood the judge to say that the law forbade them to endanger the lives of others, and as it was one of their principles to obey the law, he had given a pledge that they would call in medical advice where the disease was infectious, which pledge they had kept.

The learned judge here interposed, and asked him whether he would now give a similar pledge in cases where the sick person was a helpless infant, taking the law from him to be that though an adult, who could judge for himself, might refrain from calling in skilled advice without transgressing any law, those who had the charge of a helpless infant were bound to procure it where it was necessary. If he would give such a pledge the learned judge said he had no doubt the prosecutors would be perfectly satisfied, and give no further evidence. He would not, however, do more than promise that he would bring the point before the next assembly of his church. The prosecution, therefore, proceeded. The case added that though all this might shew that these Peculiar People were not logically consistent in their tenets and practice, the learned judge saw no reason to doubt that they were sincere.

It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.

Evidence was then given that the prisoner had sufficient means to procure skilled advice, which was easily to be obtained at Woolwich. That neither he nor the elder had any competent skill, the disease of which the child died having nothing whatever to do with teething, but being chronic inflammation of the lungs and pleura, which was of long standing, and was a disease which might have been cured at any time if competent advice had been obtained, and probably, though not certainly, would have been so cured if the advice had been called in in the early stages of the complaint.

The prisoner, in his own defence, said that he sincerely believed that by abstaining from calling in medical aid he gave the child the best chance of recovery, as if he shewed a want of faith he thought he could not rely on the promise which he thought was given. The prisoner had no counsel.

1875

THE QUEEN v. DOWNES.

The attention of the learned judge being called to the decisions of Byles, J., in *Reg.* v. *Hurry* (1), and Pigott, B., in *Reg.* v. *Hines* (2), which seemed to him contradictory, he expressed his intention to raise the question for the opinion of this Court. He did not reserve any question on the sufficiency of the evidence to prove the cause of the death of the child, or any of the questions of fact, that being a matter which he thought he was bound to decide on his own responsibility. And, accordingly, the case only stated the evidence in so far as it was necessary to make the direction to the jury and the questions put to them intelligible. But taking it that there was sufficient evidence to warrant the findings in fact of the jury, the learned judge reserved everything else.

The learned judge told the jury that the law casts on the father, who has the custody of a helpless infant, a duty to provide according to his ability all that is reasonably necessary for the child, including, if the child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of this duty it is manslaughter in the father neglecting the duty. He told them that he did not, as at present advised, think it any defence that the prisoner sincerely believed that he ought not to provide such advice, nor that he believed that he was doing the best for the child, if he had not, in fact, competent skill and knowledge himself. After explaining this more fully, he asked the jury four questions, which, to prevent any risk of mistake, were reduced to writing, and handed to them. They answered all in the affirmative. The following is a copy of the writing handed to the jury, and their answers:—

"Did the prisoner neglect to procure medical aid for the helpless infant when it was in fact reasonable so to do, and he had the ability?—Yes.

"Was the death caused by that neglect?—Yes.

"Unless both of these are proved, he is not guilty. If both proved, find him guilty, but then say further:—

(1) 76 Central Criminal Court Sessions Paper, 63.

(2) 80 Central Criminal Court Sessions Paper, 309.

"Did the prisoner bonâ fide, though erroneously, believe that medical advice was not required for the child?—Yes.

"Or bonâ fide believe that it was wrong to call in medical aid?—Yes."

The learned judge thereupon directed the verdict of guilty to be entered, and admitted the prisoner to bail.

The question for the opinion of this Court was whether the conviction so obtained on this direction and those findings should stand or be set aside.

No counsel appeared for the prisoner.

Straight, for the prosecution. The authorities are not in harmony as to whether this conviction could oe sustained at Common Law. The ruling of Byles, J., in *Reg.* v. *Hurry* (1) is clearly in favour of it, while those of Willes, J., in *Reg.* v. *Wagstaffe* (2), and Pigott, B. in *Reg.* v. *Hines* (3), tend the other way. But 31 & 32 Vict. c. 122, s. 37 (4) now imposes upon a parent a positive statutory duty to procure medical aid for his child, and death having been found to have ensued from the wilful neglect of that duty, it is manslaughter.

LORD COLERIDGE, C.J. Speaking for myself alone, I may say that had it not been for the statute to which we have been referred, I should have entertained great doubt upon this case; for, apart from the argument founded upon the statute, I think the observations in the cases cited before Willes, J., and Pigott, B., are deserving of the greatest consideration. But it is not necessary that I should express any opinion upon the question, for I assent to the argument founded upon the statute. The statute

(1) 76 Central Criminal Court Sessions Paper, 63.

(2) 10 Cox Cr. C. 530.

(3) 80 Central Criminal Court Sessions Paper, 309.

(4) By 31 & 32 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction, and being convicted thereof before any two justices shall be liable to be imprisoned for any period not exceeding six months, with or without hard labour . . ."

1875

THE QUEEN v. DOWNES.

makes it an offence punishable summarily wilfully to neglect to provide adequate medical aid for a child. By wilfully neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable. In the present case the prisoner, from motives with which I have nothing to do, did wilfully neglect to provide it. If he had been proceeded against summarily under the statute he would clearly have been liable. To cause death by culpable neglect is manslaughter, and the neglect on the part of the prisoner which caused death was a wilful disobedience to the law, a wilful neglect of the duty imposed by statute. It was, therefore, culpable neglect. On that short and distinct ground I think the conviction must be affirmed.

BRAMWELL, B. I am of the same opinion. I agree with my Lord Coleridge as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty upon parents, whatever their conscientious scruples may be. The prisoner, therefore, wilfully,—not maliciously, but intentionally, disobeyed the law, and death ensued in consequence. It is, therefore, manslaughter.

MELLOR, J. I am of the same opinion, and upon the same grounds.

GROVE, J., and POLLOCK, B., concurred.

Conviction affirmed.

Solicitor for prosecution: *W. Farnfield.*

[IN THE COURT OF APPEAL.]

1875
Nov. 8, 29.

SMITH *v.* THE UNION BANK OF LONDON.

Banker's Cheque—Effect of crossing with Name of Banker—Bonâ fide Holder for Value—Effect of Statute 21 & 22 *Vict. c.* 79, *s.* 2.

A. being indebted to plaintiff, gave him a cheque for the amount, payable to plaintiff's order, upon the defendants, a banking company. Plaintiff indorsed his name on the cheque, and crossed it with the name of his bankers, "London and County Banking Co." The cheque was stolen and passed for full value to C. C. paid it into his bankers, the London and Westminster Bank; and they presented it to the defendants, who paid it to them notwithstanding the crossing, "London and County Banking Co." Plaintiff brought an action against defendants for a conversion, and for so paying the cheque, relying on 21 & 22 Vict. c. 79, s. 2, which enacts that a cheque on a banker, payable to order or bearer and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the cheque, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:—

Held (affirming the judgment of the Queen's Bench), that the statute did not affect the negotiability of the cheque; the plaintiff had indorsed the cheque, so that C. had become bonâ fide holder of it before it was presented to the defendants, and the plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants on a special case. (1)

Action to recover 21*l.* 9*s.*, the amount of a cheque drawn by Richard Mills and others, the directors of the Civil Service Co-operative Association, upon defendants, a banking company, payable to plaintiff's order, which cheque the association, on the 9th of January, 1874, delivered to the plaintiff in payment of a debt of 21*l.* 9*s.* due from them to him; and he accepted the cheque as payment conditionally on it being honoured, and gave the association a receipt for the amount.

The plaintiff indorsed his name on the cheque and wrote across it the name of his bankers, the London and County Banking Company. While the plaintiff's servant was taking the cheque to the plaintiff's bankers it was stolen from him and sold by the

(1) Law Rep. 10 Q. B. 291.

1875

SMITH v. UNION BANK OF LONDON.

thief to Robert Thurger for 8*l.* 10*s.*, who passed it for full value to C., a customer of the London and Westminster Bank, and C. soon afterwards paid it into that bank. They presented it to the defendants for payment, and the defendants paid it to the London and Westminster Bank and returned it to the drawers.

At the time the defendants paid the cheque it was crossed with the name of the plaintiff's bankers, the London and County Banking Company, and with two transverse lines; and such crossing was made and placed on the cheque by the plaintiff in such manner as to form and be a material part of the cheque within 21 & 22 Vict. c. 79, s. 2. (1) The name of the London and Westminster Bank was not written across the cheque when it was paid by the defendants.

The question for the opinion of the Court was whether the plaintiff is entitled to recover from the defendants for so paying the cheque or for converting the same.

Nov. 8. *J. Brown, Q.C.* (with him *Collyer*), for the plaintiff.
D. Walker, for the defendants.

Part 33

(1) 21 & 22 Vict. c. 79, s. 1: "Whenever a cheque or draft on any banker, payable to bearer or to order, on demand, shall be issued crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered by any person whomsoever after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker."

Sect. 2: "Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words 'and company,' or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same remains so uncrossed, or crossed with the words 'and company,' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and company,' or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to, or altered by any person whomsoever after the making thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid."

The arguments and cases cited were the same as in the Court below.

Cur. adv. vult.

Nov. 29. The judgment of the Court (Lord Cairns, C., Lord Coleridge, C.J., Bramwell, B., and Brett, J.) was delivered by

LORD CAIRNS, C. In this case the facts are as follows:—Mills and others drew a cheque on the defendants payable to the order of the plaintiff, the plaintiff received it, indorsed it, and wrote across it the name of the London and County Banking Company. It was stolen, never reached the London and County Banking Company, but came to the hands of a customer of the London and Westminster Bank as a bonâ fide holder for value. He paid it into that bank, who presented it to the defendants. They paid it. The plaintiff then brought this action, treating himself as the owner of the cheque, and the defendants as having wrongfully converted it, and also claiming the amount of it on the ground that the defendants have infringed to his loss the statute 21 & 22 Vict. c. 79. (1)

The question is, whether any action is maintainable by the plaintiff against the defendants.

It is quite certain that before that statute no action would have been maintainable on these facts. By the plaintiff's indorsement in blank the cheque became payable to bearer, and would have continued payable to bearer, whoever that bearer might be, banker or other. The crossing of the cheque, if without the drawer's authority, could have no effect on his mandate to his banker, if with his authority (as it may well be taken to be, considering the well-known usage of holders of cheques crossing them with a banker's name), it would in effect be the drawer's direction to the drawee. Still (before the statute) the cheque would have remained a cheque payable to bearer, with, at most, a direction to pay it to no bearer but a banker; or rather, according to the cases, with only a caution or warning to the drawees, that care must be used in paying it to any one else: *Bellamy* v. *Majoribanks* (2); *Carlon* v. *Ireland*. (3) Those cases, and that of *Simmons* v.

(1) See ante, p. 32, n. (1).
(2) 7 Ex. 389; 21 L. J. (Ex.) 70.
(3) 5 E. & B. 765; 25 L. J. (Q.B.) 113.

1875

SMITH v. UNION BANK OF LONDON.

Taylor (1), clearly shew that, whatever may have been the effect of a crossing, the negotiability of the cheque was not thereby restrained. Then, have the statutes restrained it? It is impossible to hold that they have. There is not a word in them to that effect. Their sole object is to give a direction to the banker who is drawee. The first, 19 & 20 Vict. c. 25, recites that its object is to provide that drawers or holders of drafts, payable to bearer or order on demand, may be enabled effectually to direct the payment of the same only to or through some banker. It then enacts that the crossing shall have the force of a direction to the bankers upon whom the cheque is drawn, that it is to be paid to or through some banker, and the same shall be payable only to or through some banker. The Courts of Common Pleas and Exchequer Chamber in *Simmons* v. *Taylor* (1) both expressed opinions that this did not restrain the negotiability of the cheque. The other statute, 21 & 22 Vict. c. 79, enacts this more at large, with provisions against obliteration of the crossing. It says the crossing shall be deemed a material part of the cheque, but it says so for the purpose of forbidding its obliteration. The direction to the drawee, as to whom he is to pay it to, remains the same. The legislature might have enacted that any one taking a crossed cheque should take it at his peril, and get no better title than his transferor had. It has not done so. We cannot say that it has by implication restrained the negotiability of the cheque. We must say, then, that the holder of the cheque, the customer of the London and Westminster Bank, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world. Mr. Brown, indeed, admitted this. But we have thought it right to examine into the matter, because, if that admission is well founded, our judgment must be for the defendants. For if the holder was a lawful holder, and the plaintiff never could have procured payment of the cheque, how is he damnified by the defendants having paid it? Suppose, instead of their paying it, the holder had handed it to them for value, which he might have done had he kept an account with them. Or he might have gone to the drawers and exchanged this cheque for a new one not crossed. But surely if he might have done that,

(1) 2 C. B. (N.S.) 528; 4 C. B. (N.S.) 463; 27 L. J. (C.P.) 45, 248.

3 Jur. N.S. 1304; 4 Jur. N.S. 412

he and the drawers might have gone to the defendants and requested payment to him notwithstanding the crossing: as whatever may be done indirectly may be done directly. Or the holder might have opened an account with the London and County Bank and paid the cheque in, or got some friend to do so; and then the defendants must have paid it, or dishonoured it, and then the drawers would be liable on it. It never can have been the intention of the legislature that matters should be brought to a dead lock, where the holder could keep possession of the cheque, and yet be unable to get payment by consent of drawers and drawees. Such an enactment would leave the value where it ought not to be, viz. with the drawer.

It is asked, what then is the effect of the statute in enabling the payee to cross a cheque? We think the answer is easy. It imposes caution, at least, on the bankers. But, further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction. This must often operate for the benefit of the payee or holder who had crossed the cheque. Further, if in addition to the cheque being crossed, the signature of the payee was forged, he would retain his property as pointed out by Mr. Justice Blackburn (1), and could recover it from the banker notwithstanding 16 & 17 Vict. c. 59, s. 19, which protects a banker paying on a forged indorsement.

The case may be put in another way. The plaintiff cannot maintain an action for the conversion of the cheque, for he had no property in it. He cannot maintain an action on the ground that the defendants have paid the cheque contrary to the statute, because, though an action lies by the person grieved where the provisions of a statute have been infringed, yet that is only when those provisions are for his direct benefit, and he has sustained loss by their infringement. Here the prohibition of payment except to a banker is for the direct benefit of the drawer, indirectly only for the benefit of any holder of the cheque. The drawer, if any, is the person grieved. As we have shewn, the plaintiff is no loser by the cheque having been paid, as another person had

(1) Law Rep. 10 Q. B., at p. 296.

1875

SMITH v. UNION BANK OF LONDON.

become the lawful holder of it. Further, the drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute. It cannot be that in addition to this the defendants are liable to this action.

If the statute had meant to prevent any person becoming lawful holder of a crossed cheque unless he derived title through lawful holders, this ought to have been, and might easily have been, expressed. If it meant that a man might be a lawful holder, but in no way entitled to the money—a not very intelligible proposition—this ought to have been expressed.

We may observe that s. 2 of 21 & 22 Vict. c. 79 is inaccurate. It leaves out a provision for a cheque crossed generally "and Co." or "and Company."

The judgment must be affirmed.

Judgment affirmed.

Solicitor for plaintiff: *J. Terry.*

Solicitors for defendants: *Lyne & Holman.*

Nov. 8.

[IN THE COURT OF APPEAL.]

PENDLEBURY *v.* SAMUEL GREENHALGH.

Negligence—Principal and Agent—Surveyor of Highways, Liability of, for Misfeasance—5 & 6 Wm. 4, c. 50, s. 56.

2 Q.B.D. 148

Defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labour at 3½*d.* per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out, and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; and a considerable length of road was so left without light or fencing at night; and, in consequence of this, the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without

light or warning, was negligence; but that defendant did not personally interfere in doing the work, or directing the road to be left as it was:—

Held, the Court having power to draw inferences of fact, that the defendant was liable.

Taylor v. *Greenhalgh* (Law Rep. 9 Q. B. 487) distinguished.

Semble, that s. 56 of 5 & 6 Vict. c. 50 (which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions), did not apply to such a case.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendant.

The cause was tried before Mellor, J., at the Manchester Winter Assizes, 1872.

The defendant is the surveyor of highways for the township of Tottington Lower End, appointed by the vestry at a salary; and the action was brought to recover damages for personal injuries sustained by the plaintiff through a fall from a dog-cart which he was driving along a road within the said township, under the following circumstances:—

Shortly before the accident in question, it had been ordered by a resolution of the committee of management for the highways, appointed by the vestry, that a part of the road, about 150 yards in length, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution.

The defendant accordingly contracted with one John Greenhalgh to do the labour at $3\frac{1}{2}d.$ per yard, the vestry finding stones and materials. (1)

John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work accordingly, and the defendant, as surveyor, employed men to cart materials to the ground.

The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee.

The work was being done by raising about one half of the width of the road about a foot or fifteen inches, leaving the other half at its old level, and at the time of the occurrence in question a con-

(1) In answer to the Court it was stated by counsel that the agreement was not in writing.

1875

PENDLEBURY v. GREENHALGH.

siderable length of road had been so dealt with, one half of the width being a foot or more higher than the other half.

No fence, or light, or any other protection was put up to warn persons using the road at night of the difference of level.

On the night of the 23rd of May, 1872, the plaintiff, in driving along the road, came in contact with the part of the road which had been raised to a higher level, and his vehicle was upset, and he himself injured.

The plaintiff was not guilty of any contributory negligence.

The defendant, before the accident, had been warned by persons using the road that its condition was dangerous, but took no steps to provide any protection until after the accident, when he caused a light to be put up.

The jury found that the leaving the road in its then state, without light or warning, was negligence, but that the defendant did not personally interfere in doing the work or directing the road to be left as it was.

A verdict was entered for the plaintiff, damages 20*l.*, and leave was reserved to the defendant to move to enter the verdict for him, the Court to have power to draw inferences of fact. A rule was obtained accordingly, on the ground that no personal liability on the part of the defendant was shewn.

This rule was afterwards made absolute, following the decision of the Court in *Taylor* v. *Greenhalgh* (1), which was another action arising out of the same accident.

Ambrose, Q.C., for the plaintiff. The defendant took an active part in the levelling of the road, and was not the mere instrument by whom the contract was made on behalf of the committee with John Greenhalgh, as the Court of Queen's Bench seem to have thought. First, the interference with the highway was an illegal act; there was no power in the vestry to give the order to alter the level; all that the surveyor or committee of management can do is to keep the roads in repair: see ss. 6, 9, and 18 of 5 & 6 Wm. 4, c. 50.

[LORD COLERIDGE, C.J. Surely the parish have power to alter the level?]

(1) Law Rep. 9 Q. B. 487.

Not without first obtaining an order of justices. But, secondly, assuming the work to be primâ facie authorized in law, still the defendant is liable for the negligent mode in which the work was left.

[LORD CAIRNS, C. Is there any case in which a surveyor of highways has been held liable?]

There is a class of cases, such as *Young* v. *Davis* (1), in which a surveyor has been held not liable, but that is only for non-feasance, and the principle is, that he stands in the position of the parish, and a parish can only be indicted for the non-repair of a highway. Here the act is an act of misfeasance in leaving the road in a dangerous state without fence or light. *Foreman* v. *Canterbury* (2) shews that such a public body as the committee of the vestry for highways would be liable, and the same principle applies to the defendant, their surveyor, if he be himself guilty of negligence. In *Newton* v. *Ellis* (3), it was a question of notice of action, but it was never suggested that the surveyor would not have been liable for personal negligence under similar circumstances to the present.

[LORD CAIRNS, C. It must be taken that the defendant employed a competent person to do the work.]

John Greenhalgh was only employed to do the labour. Although the jury have found that the defendant did not personally interfere in doing the work and in directing the road to be left as it was, yet the Court are to draw inferences of fact, and the defendant himself stated that he superintended the work on behalf of the committee; and he had express notice of the dangerous state the road was left in. Lastly, the defendant would be liable by virtue of s. 56 of 5 & 6 Wm. 4, c. 50 (4), which imposes a penalty on a surveyor who leaves stones or other matter in a dangerous

(1) 2 H. & C. 197.

(2) Law Rep. 6 Q. B. 214.

(3) 5 E. & B. 115; 24 L. J. (Q.B.) 337.

(4) 5 & 6 Wm. 4, c. 50, s. 56: "If any surveyor shall lay, or cause to be laid, any heap of stone, or any other matter or thing whatsoever, upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding 5*l.*"

1875

PENDLEBURY v. GREENHALGH.

position on a road, on the principle of the cases cited in the Court below. (1)

[LORD CAIRNS, C. That section applies to leaving materials in a dangerous position; it was the road itself here that was dangerous, not the materials.]

J. Edwards, Q.C., for the defendant. No point was made at the trial that the act of raising the level of the road was unlawful; it must be taken, therefore, for the present purpose, to have been lawful; and then the case simply amounts to an attempt to make the defendant, quà surveyor, liable, although he did not personally interfere.

[LORD COLERIDGE, C.J. Is that so on the facts? *Foreman* v. *Canterbury* (2) seems very much in point.]

Ambrose, Q.C., was not heard in reply.

LORD CAIRNS, C. Although the conclusion at which this Court has arrived does not agree with that of the Court of Queen's Bench, the difference is not so much a difference on any point of law as a difference between the view taken by the Court of Queen's Bench of the facts and the view which this Court takes of the facts as stated in the case. The first question, as in most of these kinds of cases, is one of fact, and we have to ascertain what was the precise state of facts with regard to the steps taken by the defendant to carry out the work directed to be done by the resolution of the committee. We may assume that what the committee resolved should be done was perfectly lawful if done in a proper manner, viz., the alteration of the level of the highway. The case states: "It had been ordered by a resolution of the committee of management for the highways appointed by the vestry that a part of the road, about 150 yards, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution." Now, I will assume that the defendant, as he could not have carried out the resolution with his own hands, would not have been responsible in the present instance, if he had contracted in a proper manner with a third person to carry out the work with all its incidents. But he did not contract with John Greenhalgh for the performance of the work as a whole. He contracted, at

(1) Law Rep. 9 Q. B. at p. 489, n. (1). (2) Law Rep. 6 Q. B. 214.

most, for the performance of a part only. The case proceeds: "The defendant accordingly contracted with one John Greenhalgh to do the labour at 3½*d.* per yard, the vestry finding stones and materials. John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work, and the defendant, as surveyor, employed men to cart materials to the ground. The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except"—a most material exception—"superintending on behalf of the committee." It was very properly admitted on the argument that it was necessary that during the night the road under alteration should be fenced off or lighted, in order to avoid danger to persons driving along it. Now, the work to be done was of a complex kind; it consisted of four parts, the materials, labour, superintendence, and, as incident to the work, lighting and fencing during the night. We have, therefore, to look and see what the defendant contracted for with John Greenhalgh out of these four items. I cannot see that he—it is stated expressly—contracted for anything except labour; the materials were found by the vestry, superintendence by the defendant, as surveyor. By whom was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labour should supply the light or fencing. The contract, we are informed, was not in writing, and we must take it that the labour alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible. Therefore, without laying down any general rule, I think, under the circumstances of this case, the defendant continued liable, and that the plaintiff is entitled to judgment.

LORD COLERIDGE, C.J., BRAMWELL, B., and BRETT, J., concurred.

Judgment reversed.

Solicitors for plaintiff: *Shaw & Tremellen, for P. & J. Watson, Bury.*

Solicitors for defendant: *Clarke, Woodcock, & Rylands, for Grundys, Manchester.*

1875
Nov. 8.

[IN THE COURT OF APPEAL.]

SNEESBY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company—Negligence—Consequential Damages—Court of Appeal—Practice on Argument of Appeal.

A herd of plaintiff's beasts were being driven at 11 p.m. along an occupation road to some fields. The road crossed a siding of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them, and they rushed away. Six of them were ultimately found at between 3 and 4 a.m. lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line:—

Held (affirming the judgment of the Queen's Bench), that, as defendants had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote.

On the argument of a case in the Court of Appeal two counsel will be heard on either side.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the plaintiff. (1)

The following are the material parts of the case:—

The plaintiff is a cattle dealer and attends the Wakefield market.

The defendants are the owners of a main line of railway and branches at Wakefield.

On the 29th of April, 1874, twenty-nine beasts of the plaintiff were sent to Wakefield by railway, and about 11 o'clock p.m. the plaintiff's servants, being competent persons and in sufficient numbers for the purpose, drove the beasts with others from a yard, where they had been temporarily put up and fed, along an occupation road, which is crossed by sidings of the defendants, and is continued under the Wakefield, Pontefract, and Goole branch of the defendants' railway in the direction of a field, belonging to

(1) Law Rep. 9 Q. B. 263.

Mr. Jaques, on the south side of the defendants' said main line of railway, to be kept there ready for the next morning's market, this being their lawful and proper road.

The sidings cross the occupation road on a level, and are not fenced in any way from the road; there is a steep incline from the level of the railway to the level of the road, and while the plaintiff's beasts were crossing the sidings several trucks were by the negligence of the defendants' servants allowed to run down the siding between the beasts in question and the persons in charge of them, and so separated the beasts from the drovers; whereupon the beasts became alarmed and rushed along the occupation road out of the control of their drovers.

Six of these beasts were found the following morning between three and four o'clock on the defendants' main line of railway dead or dying, at a distance of about a mile from the spot where they appeared to have first got on to the defendants' main line of railway.

On following the tracks of these beasts, it appeared that after they had crossed the sidings they passed along the road through an archway under the Wakefield, Pontefract, and Goole branch railway, and beyond Jaques' field, and had gone along the occupation road about a quarter of a mile, where they broke through the fence, which was in a defective state, and which separated the road from an orchard and garden belonging to the defendants and adjoining their main line of railway, and had passed along it to the east end or far corner where there was no fence and so on to the main line of railway, over which they wandered for some distance in the direction of Kirkthorpe, where they were found.

The garden or orchard is the property of the defendants, but was in the occupation of a tenant from year to year under an agreement, by the terms of which the tenant was bound to repair the fences adjoining the occupation road.

Upon the above facts the presiding judge directed a nonsuit, with leave to move to enter a verdict for 153*l.* for the plaintiff.

A rule was obtained accordingly on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences, and were liable for the death and injury of the cattle.

1875

SNEESBY v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

The Court of Queen's Bench made the rule absolute.

On appeal,

Herschell, Q.C., for the defendants, contended that there was no duty on the defendants to fence the garden, and that the insufficiency of the fence was the immediate cause, if not the causa sine quâ non of the death of the beasts; and the damages were therefore too remote, and the defendants not liable.

Beasley, on the same side, had nothing to add on the present occasion, but asked for the direction of the Court as to whether more than one counsel could be heard.

LORD CAIRNS, C. The practice must be uniform in this Court, and will be assimilated to the former practice in the Court of Appeal in Chancery, and two counsel will therefore be heard for each side.

Wills, Q.C., and *J. W. Mellor, Q.C.*, for the plaintiff, were not heard.

LORD CAIRNS, C. It appears from the facts as stated in the case, that the defendants' servants were guilty of negligence in allowing the trucks to move down at a time when, if they had not been guilty of negligence, they would have seen the cattle were crossing. The result of this negligence was twofold. First, the trucks separated the cattle from their keepers; secondly, the cattle were frightened, and became infuriated, and were driven to act as they would not have acted in their natural state. Everything that occurred or was done after that must be taken to have occurred or been done continuously: the cattle rushed on in a state of fury, passed along the occupation road, charged the fence of the garden, and so got on to the railway, and were ultimately killed.

It is no answer on the part of the defendants to say that the fence was an imperfect fence. It might just as well have been that there was no fence at all. The question would have been precisely the same. The case, moreover, does not state that the fence would have been insufficient if the cattle had been in the ordinary state of cattle. But it is enough to say on the present occasion that the defendants cannot justify against the conse-

quences of their negligence by saying that the fence in question was not a perfect fence as between landlord and tenant.

LORD COLERIDGE, C.J., BRAMWELL, B., and BRETT, J., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Clarke & Sons, for Wainwright, Manchester.*

Solicitors for defendants: *Clarke, Woodcott, & Co., for Grundy, Manchester.*

[IN THE COURT OF APPEAL.]

Nov. 9.

EVANS *v.* HOOPER.

Marine Insurance—Mutual Insurance Association—Manager suing for Contributions.

The manager of a mutual insurance association cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member and profess to give such a power.

Gray v. *Pearson* (Law Rep. 5 C. P. 568) approved.

Declaration that the defendant was a member of a mutual insurance company and caused himself to be insured in respect of a vessel for a certain time, and that the plaintiff, who was manager of the association, in consideration that the defendant agreed to comply with certain rules which it was agreed between the plaintiff and defendant should form part of the policy, subscribed the policy on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. The declaration set out the rules, which provided how the amount of contributions to be paid by members should be ascertained, and that the manager should have power to sue for the amount due from any defaulting member. Averment that certain contributions became due which the defendant did not pay. On demurrer:—

Held, that the action could not be maintained: for that the plaintiff signing on behalf of the members did not take upon himself any liability, and therefore there was no consideration, as between the plaintiff and defendant, for the promise of the defendant.

ERROR from the judgment of the Mayor's Court, London (1), in favour of the defendant on demurrer to the declaration.

Declaration that the defendant was a member of a certain association called the British Marine Mutual Insurance Association, and by a policy of insurance of the 23rd of February, 1873, caused himself to be insured, lost or not lost, from the 20th of February,

(1) The record was brought up through the office of the Queen's Bench.

1875

EVANS v. HOOPER.

1873, to the 20th of February, 1874, upon the body, &c., of the ship *Sunk Light Tender*, against perils of the seas and other perils and losses more particularly mentioned in the policy, the ship and premises being valued at 400*l.*; and the plaintiff, in consideration of the defendant's agreeing to comply with the rules thereinafter mentioned subscribed the policy for 300*l.* on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. And the defendant was then and thence, until the commencement of this action, interested in the ship and premises to the amount of the moneys insured by him therein. And it was agreed between the plaintiff and the defendant that certain rules thereunto annexed should form part of the policy, which rules, so far as material, were as follows:—

"1. That the members of this association shall severally, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships, or shares of ships, from certain dates in each year, against all losses, perils, and damages whatsoever.

"2. That the committee for superintending the affairs of this association meet once in every three months, or oftener if required, to examine and decide on claims; and no member thereof shall act as such in the settlement of his own average or loss.

"4. The manager is empowered to levy contributions of one fourth part of the estimated premium, which shall be drawn for at two months date from certain dates in each year, such premiums of insurance to form a fund for the payment of claims. Provided always, that if the losses and expenses exceed the amount of premiums so realised, the deficiency shall be made good by an additional percentage on the premiums to be drawn for, as the committee may determine. But should the premiums so realised exceed the losses and expenses incurred, then the surplus to be proportionately returned.

"5. That the manager's drafts on any member of this association for his proportion of the annual estimated premium and for any additional percentage thereon shall be duly accepted and punctually paid when due, and if any member shall neglect, omit, or refuse to accept any such drafts or to pay his contributions

thereto, his respective ship or ships shall cease to be insured in or by this association, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein, and the manager is hereby authorized and empowered to sue for the amount due from any defaulting member, and, if not recovered, the loss shall be borne proportionately by all the members."

Averment that the plaintiff is the manager referred to in the rules, and that being such manager he levied contributions for the year ending on the 20th of February, 1874, and afterwards it was found that the losses and expenses for the said year exceeded the amount of premiums so realised, and thereupon it became necessary that the deficiency should be made good by an additional percentage on the premiums to be drawn for as the committee might determine. And thereupon the committee declared that the manager should draw on the members in accordance with rule 4, and among others on the defendant for his proportion of two additional calls of one-fourth, and also of one-half of the estimated premium respectively. And afterwards the plaintiff drew on the defendant as such member as aforesaid for certain amounts, to wit, 7*l.* 10*s.* and 15*l.*, being one-fourth and one-half respectively of the defendant's estimated premium; and all things happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiff to have the said drafts accepted by, and the amounts paid by, the defendant. Yet the defendant did not accept the said drafts, and did not pay the said amounts.

Demurrer and joinder.

The Court gave judgment for the defendant, that the declaration was bad in substance.

On error by the plaintiff,

Maclachlan and *Lanyon*, for the plaintiff. The plaintiff is entitled to sue. This is not an action for a loss, but an action founded on the contract between the plaintiff and defendant. There are, in fact, two contracts, that of underwriting between the defendant and the members, and another between the manager and the person insured to abide by the rules set out.

1875

EVANS v. HOOPER.

[LORD CAIRNS, C. Must not in legal effect the contract be read as though it said "the plaintiff taking no liability on himself?"]

The consideration for the contract with the plaintiff is that he would subscribe the policy, and this he has done, and as the adequacy of the consideration cannot be looked into, this is sufficient. On the demurrer to the declaration the express contract contained in it is admitted. In *Gray* v. *Pearson* (1) the question arose on a count for money paid and on accounts stated, and in that case the plaintiff was either a mere volunteer or else he was suing as a public officer. Secondly, it must be taken on the declaration that all the members signed the policy.

J. Brown, Q.C., and *F. Turner*, for the defendant, were not called upon.

LORD CAIRNS, C. It is quite unnecessary to advert to the second point raised, because it appears to me that the first objection is sufficient to dispose of the case. The declaration states a policy of insurance, in which the defendant is the person insured, and the British Marine Insurance Association are the insurers and underwriters. The policy was signed on their behalf by their manager, and there is a rule which professes to authorize the manager to sue the persons insured for contribution in case of deficiency of funds. If the matter stopped there, that would amount simply to an attempt by an unincorporated company to authorize their manager to sue on their account. Such an agreement to authorize an agent to sue on behalf of the partnership is a contract that the law does not recognise. But it is argued that the averments in the declaration amount to this, that there was a consideration passing between the manager and the person insured, who agreed that if the manager would underwrite and sign the policy, he, the person insured, would agree to be bound by and obey the rules of the company. Now let us see how the averments stand on that point. The declaration says that the plaintiff subscribed the policy on behalf of the several members of the British Marine Mutual Insurance Association, every member bearing his equal proportion according to the sums mutually insured therein, and that he did so in consideration of the defend-

(1) Law Rep. 5 C. P. 568.

ant's agreeing to comply with the rules. This is an averment that the defendant agreed to comply with the rules in consideration of the plaintiff subscribing the policy, not on his own behalf, but on that of the members of the association, and so that his signature should not be taken to import any personal liability, but simply to operate against the members. If so, no consideration is stated. The engagement would be on behalf of the principals, and not on behalf of the agent, and therefore no consideration is shewn on which the agent can sue. The judgment must, therefore, be affirmed.

1875

EVANS v. HOOPER.

LORD COLERIDGE, C.J., BAGGALLAY, J.A., and BRAMWELL, B., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Stocken & Jupp.*
Solicitors for defendant: *Keene & Marsland.*

EX PARTE MAUGHAN.

Nov. 23.

Certificate to sell Spirits by Retail—Adjournment of Annual Licensing Meeting —Fresh Application to Adjourned Sessions—New Qualification—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 7, 8—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 69.

The applicant, a grocer, applied at the general annual licensing meeting in August for a certificate to sell spirits under 35 & 36 Vict. c. 94, s. 68, by retail off his premises. The application was refused, on the ground that he did not hold a wholesale dealer's excise licence. He took out this licence, gave fresh notices, and applied again for a certificate at the adjourned sessions in September. The magistrates refused the application, on the ground that it had already been disposed of and could not be re-heard :—

Held, on the authority of *Reg.* v. *West Riding Justices* (Law Rep. 5 Q. B. 33), that the second application ought to be heard, as it was not concluded by the previous decision.

RULE calling upon certain licensing justices of the Kirkdale Division of the county of Lancaster to shew cause why a mandamus should not issue, commanding them to hold a further adjournment of the general annual licensing meeting for the division, held the 27th of August, 1875, and, by adjournment, the 30th of

BRL. LONDIN UNIV.

1875

EX PARTE MAUGHAN.

September, 1875, and hear the application of J. Maughan for a licence to sell spirits by retail to be consumed off the premises at his house, Liverpool Road, Great Crosby, Lancaster.

It appeared from the affidavits that J. Maughan was a grocer, carrying on business at Great Crosby, Lancaster, and in July and August, 1875, served the requisite notices of his intention to apply at the general annual licensing meeting of the Kirkdale sessions, on the 27th of August, for a certificate, authorizing him to sell spirits, beer, and wines by retail to be consumed off his premises. (1) The justices refused to grant a licence to sell spirits, on the ground that he had not first taken out a wholesale dealer's

(1) 9 Geo. 4, c. 61, s. 1: "In every division of every county and riding, &c., in England, there shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting) for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling-houses, to sell exciseable liquors by retail to be drunk or consumed on the premises therein specified, and such meetings shall be holden in Middlesex and Surrey, within the first ten days of March, and in every other county on some day between the 20th of August and the 14th of September, inclusive."

Sect. 3: "It shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence.

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), ss. 4, 5, from and after July 15, 1869, no licence for the sale by retail of beer, cider, wine, &c. (except as provided), is to be granted, except upon the production of a certificate to be granted by the justices at the general annual licensing meeting."

Sect. 7: "In the case of a house or shop not theretofore licensed for the sale by retail of beer, cider, or wine, twenty-eight days notice of such application is to be given."

Sect. 8: "No application for a certificate in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following grounds: (4). That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 68, "No person shall sell by retail liqueurs or spirits under the authority of any retail licence which such person shall have obtained as a wholesale spirit dealer from the Commissioners of Inland Revenue, except in premises occupied and used exclusively for the sale therein of intoxicating liquors . . . . unless such person shall have first obtained from the licensing justices a licence authorizing such sale in premises not exclusively so occupied or used."

excise licence to sell spirits. The licensing meeting was then adjourned to the 30th of September. Maughan then served fresh notices, paid the excise duties, obtained a wholesale dealer's licence, and at the adjourned sessions renewed his application, but the justices again refused the application, on the ground that it had been already heard and disposed of, and that the applicant could not make a second application at the same licensing meeting.

Gully shewed cause. A shopkeeper's retail spirit licence, commonly called "a grocer's licence," can only be taken out by persons holding a spirit dealer's retail spirit licence under 24 & 25 Vict. c. 21, s. 2, and 23 & 24 Vict. c. 114, s. 169. There was, therefore, good ground for refusing the application in the first instance, and after it had once been disposed of it could not be reheard at the adjourned sessions. In *Ex parte Rushworth* (1) it was held that a beerhouse keeper whose application for a certificate under 32 & 33 Vict. c. 27, s. 7, was refused, on the ground that his house was frequented by prostitutes, could not renew his application on the adjournment day, though prepared with evidence to rebut the charge. It is true that in *Reg.* v. *Justices of West Riding* (2), where B. applied for a certificate at a general annual licensing meeting, and the application was refused upon proof that he had been convicted of misconduct in another house, it was

---

Sect. 69: "A licence for the sale of liqueurs or spirits by retail not to be consumed on the premises, may, where such licence is required by this Act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises, may by law be granted."

By 37 & 38 Vict. c. 49, s. 27, "No appeal shall be had to quarter sessions from any act of any justice with respect to the grant of new certificates under the Wine and Beerhouse Acts, 1869 and 1870."

By 23 & 24 Vict. c. 114 (Excise), s. 169, "Any person duly licensed as a dealer in spirits may take out an additional licence authorizing him to sell by retail any quantity (the same not being less than one reputed quart bottle, or in the bottles in which the same may have been imported) of foreign liqueurs not to be drunk or consumed on the premises."

By 24 & 25 Vict. c. 21 (Excise), s. 2, "Any person duly licensed as a dealer in spirits in England, may take out an additional licence authorizing him to sell by retail foreign or British spirits in any quantity not less than one reputed quart bottle . . . . not to be drunk or consumed on the premises."

(1) 23 L. T. (N.S.) 120.

(2) Law Rep. 5 Q. B. 33.

1875

EX PARTE MAUGHAN.

held that the refusal was no bar to an application by D. at an adjourned meeting; but there the matter was not res judicata, for the first decision was on grounds personal to B. Here the second application is nothing but a renewal of the original one.

Manisty, Q.C., and *Bremner*, in support of the rule, were not heard.

PER CURIAM (Mellor, Lush, and Field, JJ.). We think that this case is governed by *Reg.* v. *Justices of West Riding* (1), and that the justices were bound to entertain the application at the adjourned sessions.

Rule absolute.

Solicitors for appellant: *Gregory, Rowcliffes, & Rawle, for Bremner & Sons, Liverpool.*

Solicitors for justices: *R. M. & F. Lowe.*

Nov. 22.

THE QUEEN ON THE PROSECUTION OF MATTHEW SYKES *v.* DAVID SYKES AND OTHERS, JUSTICES OF THE BOROUGH OF HUDDERSFIELD.

Beer—32 & 33 Vict. c. 27, s. 8—Licence to retail Beer not to be consumed on Premises—Justices bound to state Ground of Refusal—Mandamus to hear and determine.

Pet. 5
34 QBD 374.

By 32 & 33 Vict. c. 27, s. 8, no application for a licence to retail beer not to be consumed on the premises shall be refused, except upon one or more of four grounds specified. Justices, on refusing a licence, declined to state on which of the grounds they refused it:—

Held, that the justices were bound to state the ground, and that, not having done so, they had not heard and determined the application according to law; and a mandamus was granted commanding them "to hear and determine" the application.

RULE calling upon certain justices of the borough of Huddersfield, to shew cause why a mandamus should not issue commanding them to hold an adjourned licensing meeting, and to hear and determine the application of Matthew Sykes for the renewal of his licence to sell beer, &c., not to be consumed on his premises, under 32 & 33 Vict. c. 27.

By 32 & 33 Vict. c. 27, s. 8: "No application for a certificate

(1) Law Rep. 5 Q. B. 33.

under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following grounds, viz.:—

1. That the applicant has failed to produce satisfactory evidence of good character:

2. That the house or shop, in respect of which a licence is sought, or any adjacent house or shop, owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:

3. That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has, through misconduct, been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles:

4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision."

The affidavit on which the rule was granted stated that the justices, on refusing the licence, had declined to state on which of the four grounds they refused it.

On shewing cause, the justices made affidavit that they had not refused the licence on the fourth ground; but they did not state on which ground they had acted.

Maule, Q.C., and *Ewins Bennett*, shewed cause. There is nothing in the section requiring the justices to state on which ground they acted: at all events, it is sufficient that they did not act on the fourth ground, and consequently they were not obliged to state their reasons in writing; and it is only on this fourth ground that they need give any reasons for their refusal.

Manisty, Q.C., and *Waddy, Q.C.*, were not heard in support of the rule.

MELLOR, J. The justices may not be obliged to state the reasons which have induced them to refuse the licence on one of

1875

THE QUEEN v. SYKES.

the four grounds named in the section; but at all events, they ought to state on which of the grounds it was that they refused the licence, in order to justify their decision, and shew that they were acting within their jurisdiction. They refused to state on which ground they refused the licence; and they still, by their silence, refuse to do so. Until they have declared the ground of their refusal they have not heard and determined the application according to law, and the rule is in proper form and must be absolute for a mandamus to them "to hear and determine" the application.

QUAIN, J. I am of the same opinion. The legislature has expressly enacted that such a licence as this shall be refused on four grounds only. The justices, by refusing a licence sub silentio, and refusing to state on which of the grounds they acted, might practically evade the enactment altogether, and refuse licences arbitrarily and on other grounds than the four mentioned in the section. They cannot be said to have "heard and determined" the application until they have stated on which ground their refusal was based; especially as, if their refusal proceeded on the fourth ground, the justices are bound to specify to the applicant in writing the grounds of their decision; and this right he would practically be deprived of if the justices were at liberty to refuse the licence without saying on which of the four grounds it was refused. The mandamus must go to the justices to hear and determine the application.

FIELD, J., concurred.

Rule absolute. (1)

Solicitors for applicant: *Learoyd & Co., for Learoyd, Learoyd, & Morrison, Huddersfield.*

Solicitors for justices: *Van Sandau & Cumming, for H. Mills, Huddersfield.*

(1) See the next case.

THE QUEEN *v.* DE RUTZEN AND OTHERS, JUSTICES OF GLAMORGANSHIRE. 1875 Dec. 20.

Beer, Licence to sell, not to be consumed on the Premises—Strong Beer Licence—Non-residence no Disqualification—32 & 33 *Vict. c.* 27, *s.* 8—26 & 27 *Vict. c.* 33, *s.* 1—*Mandamus to hear and determine.*

M., who held a strong beer licence, applied to licensing justices for a certificate to take out a retail licence to sell beer, &c., not to be consumed on the premises. The justices refused the licence under 32 & 33 Vict. c. 27, s. 8, subs. 4, on the ground that the applicant was not qualified as by law is required by reason of his intention not to reside on the premises :—

Held, that, as the holder of a strong beer licence was entitled, under 26 & 27 Vict. c. 33, s. 1, to the retail licence without any other qualification, residence was not required ; and that as the justices, therefore, had not determined according to law, a mandamus must be granted to them to hear and determine the application according to the statutes in that behalf.

RULE calling upon certain licensing justices for the district of Miskin Higher, Glamorganshire, to shew cause why a mandamus should not issue commanding them to hold a further adjournment of the general licensing meeting, held on the 27th of August, 1875, and on subsequent days by adjournment; and to proceed to hear and determine, pursuant to the statutes in that behalf, the matter of an application by William Morris for licences or certificates to hold excise licences to sell beer, wine, and spirits by retail, not to be consumed on the premises, at his shop, situate No. 63, Oxford Street, Mountain Ash.

From the affidavit upon which the rule was granted it appeared:

That Morris held in respect of the above premises a wholesale spirit dealer's licence together with a strong beer dealer's licence from the Commissioners of Inland Revenue for the sale of beer and spirits.

Morris had given due notice under s. 7 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), and the Licensing Act, 1872 (35 & 36 Vict. c. 94), of his intention to apply at the general annual licensing meeting of the Miskin Higher district, for a licence or certificate to hold an additional excise licence to sell by retail beer not to be consumed on the premises under 26 & 27 Vict. c. 33, s. 1, and also for a licence or certificate to hold an additional excise licence to sell by retail spirits not to be con-

1875

THE QUEEN v. DE RUTZEN.

sumed on the premises, under 24 & 25 Vict. c. 21, s. 2, and also for a licence or certificate to sell by retail wine not to be consumed on the premises, under 23 Vict. c. 27, s. 3.

The premises were duly rated as required by 33 & 34 Vict. c. 29, s. 10.

The justices, after an adjournment, refused their certificate, on the ground that the applicant did not intend to reside on the premises and personally conduct the business; and the justices were of opinion that the Act of 1869 (32 & 33 Vict. c. 27) contemplated as requisite such residence and personal superintendence, having reference more particularly to the four grounds of refusal in the proviso to s. 8. (1)

B. T. Williams, Q.C., shewed cause. By 32 & 33 Vict. c. 27, s. 8: "No application for a certificate under this Act in respect of a licence to sell by retail beer, cider or wine, not to be consumed on the premises, shall be refused except upon one or more of the following grounds; . . . 4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required." The justices were right in thinking that residence on the licensed premises was a qualification required by law in a person applying for such a licence. The 1 Wm. 4, c. 64, was the first Beerhouse Act; and by s. 1, after reciting that "it is expedient, for the better supplying the public with beer in England, to give greater facilities for the sale thereof than are at present afforded by licences to keepers of inns, alehouses, and victualling houses," it is enacted that "it shall and may be lawful for any and every person, who shall obtain a licence for that purpose under the provisions of this Act, to sell beer, ale, and porter by retail in any part of England, in any house or premises specified in such licence;" and then by s. 2 it is enacted, "that it shall be lawful for any person, being a householder . . . . who shall be desirous of selling beer, ale, and porter by retail under the provisions of this Act, to apply for and to obtain an excise licence for that purpose" in the form given in the schedule. This applied generally to the sale of beer by retail, whether to be drunk on the premises or not. The 4 & 5 Wm. 4, c. 85, s. 1, after reciting that much evil had

(1) See ante, p. 52.

arisen from the management and conduct of houses in which beer and cider was sold by retail under the provisions of 1 Wm. 4, c. 64, enacts, "that it shall be lawful for the commissioners of excise to grant licences for the sale of beer, ale, porter, cider or perry, under the provisions of the recited Act, to any person applying for the same, but that such licence shall not authorize the person obtaining it to sell beer or cider to be drunk or consumed in the house or on the premises specified in the same licence, unless the same be granted upon the certificate hereinafter required." That, by s. 2, was a certificate of good conduct in his favour signed by four inhabitants of the parish and an overseer. This was abolished by 32 & 33 Vict. c. 27, and the certificate of justices substituted. This enactment of 4 & 5 Wm. 4, c. 85, was the origin of a licence to retail beer not to be consumed on the premises. Then came 3 & 4 Vict. c. 61, s. 1, which recites both the previous Acts, and enacts, "that no licence to sell beer or cider by retail under the said recited Acts or this Act shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed." This applies generally to a licence to retail beer, &c., whether to be consumed on the premises or not; so that residence was required in the present case.

[*Poland*, contrà, called attention to 26 & 27 Vict. c. 33, s. 1, which requires in a person holding a strong beer licence, as the present applicant did, no other qualification whatever for a licence to retail beer not to be consumed on the premises.]

Secondly, if the justices were wrong, still they have heard and determined the application, and to grant a mandamus would be in effect to command them to determine in a particular way, that is, by granting a certificate, which is what the practice of the Court does not permit.

[BLACKBURN, J. Assuming that residence is not required, then the justices have not determined according to law.]

Poland, in support of the case. No residence was required in the present case. The Act as to the sale by retail of wine not to be drunk on the premises is 23 Vict. c. 27, s. 3. In that the only qualification required for such a licence is that the person shall keep a shop for the sale of any goods or commodities other than foreign wine, or shall have taken out a licence as a dealer in wine." As to a licence to retail spirits not to be drunk on the premises,

1875

THE QUEEN v. DE RUTZEN.

by 24 & 25 Vict. c. 21, s. 2, "Any person duly licensed as a dealer in spirits may take out an additional licence authorizing him to sell by retail foreign or British spirits in any quantity not less than one reputed quart bottle, or, as to foreign liqueurs, in the bottles in which the same have been imported, not to be drunk or consumed upon the premises." Lastly, by 26 & 27 Vict. c. 33, s. 1, "Any person who in England or Ireland shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises, may take out an additional licence on payment of the excise duty of 1*l.* 1*s.* and 5 per cent. thereon; and the same shall authorize such person to sell beer in any less quantity, and in any other manner, than as aforesaid, but not to be drunk or consumed on the premises where sold; and such additional licence shall be granted without the production of any certificate or the possession of any other qualification than the licence herein first mentioned." This clearly does away with the necessity of any qualification, such as residence, which the justices thought necessary.

[COCKBURN, C.J. This style of piecemeal legislation is most perplexing. What is the meaning of 32 & 33 Vict. c. 27, s. 8, subs. 4, which makes one of the grounds on which a licence to sell beer by retail, not to be consumed on the premises, may be refused, "that the applicant, or the house in respect of which he applies, is not duly qualified as by law is required?"]

It is difficult sometimes to give reasons for legislation; but possibly the explanation is that by s. 19 this part of s. 8 is made to apply to the renewal of a licence to sell beer to be consumed on the premises.

COCKBURN, C.J. It would seem that the justices were wrong. The rule must be made absolute.

PER CURIAM (Cockburn, C.J., Blackburn and Field, JJ):

Rule absolute. (1)

Solicitors for applicant: *Bell, Brodrick, & Gray.*
Solicitors for justices: *Purkis & Perry.*

(1) See the preceding case.

McHOLE, APPELLANT; DAVIES, RESPONDENT.

1875
Nov. 10.

Market—Market and Fairs Clauses Act, 1847 (10 *Vict. c.* 14), *s.* 13—*Selling or exposing for Sale otherwise than in own "Dwelling-place or Shop."*

2 QBD 130

The appellant was convicted under a local Act in similar language to s. 13 of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), which prohibits a person from selling or exposing for sale within the limits of a market articles for which tolls are authorized to be taken, except in his dwelling-place or shop.

The appellant resides in a street within the limits, and occupies a large yard adjoining his residence, in which are sheds and other places for sale of cattle and sheep, and he exposed there for sale 200 sheep. The entrance to the yard is from the street through double doors. After passing through the doors there is a place about thirty feet by twenty feet, covered in by beams and flooring. Appellant resides in a small house, supported by pillars on either side of this place, the floor of his house forming the ceiling of this under space; the yard extends further back without a ceiling, to about 158 feet from the doors. There are stairs from the dwelling-house down into the covered space, and this is the communication between the yard and sheds and the house:—

Held, that the yard and sheds were not the dwelling-place or shop of the appellant; and that he was rightly convicted.

CASE stated by the stipendiary magistrate for the borough of Swansea under 20 & 21 Vict. c. 43.

The appellant appeared to a summons charging that he, on the 13th of April, 1875, did unlawfully expose for sale 200 sheep in a certain place other than and out of the Swansea Market, that is to say, in a shed situate in Back Street, in the town of Swansea, the said place not being a dwelling-house or shop in his occupation, against the statute 26 & 27 Vict. c. xiii.

The information and summons were founded on s. 38 of the Swansea Municipal Corporation Act, 1863 (26 & 27 Vict. c. xiii.), which is as follows:—

After the passing of this Act every person, other than a licensed hawker, who shall sell or expose for sale in any place within the borough, except in his own dwelling-place or shop, any articles in respect of which tolls are by this Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings: Provided always that nothing in this Act contained shall subject any person to a penalty for exposing for sale any horse, mare, or gelding at any stable within the borough, or for exhibiting any horse mare, or gelding within a distance of 200 yards from any stable at which the same may be exposed for sale as aforesaid.

It was admitted that the appellant resides in Back Street, in the borough, and that he occupies a large yard adjoining his residence,

1875

McHOLE v. DAVIES.

in which there are sheds and other places for sale of cattle and sheep, and that on the day named in the summons he did expose for sale 200 sheep.

The entrance to the yard and sheds is from Back Street through double wooden doors. After passing through the doors a person first enters a place about thirty feet by twenty, covered in by beams and flooring. Mr. McHole resides in a small house supported by pillars on either side of this place, the floor of his house forming the ceiling of this under space. The yard then extends further, without a ceiling, to the length altogether of about 158 feet from the street doors, and this part is fitted with sheds for the accommodation of a considerable number of cattle and sheep.

There is no actual communication between the dwelling-house above and the sheds in the yard by covered way or through the house. In order to enter the yard and sheds the appellant descends stairs from his dwelling-house above into the covered space, and thence passes into the open yard and sheds.

Upon the facts admitted, and after a personal view, the magistrate determined and adjudicated that the appellant did unlawfully expose for sale 200 sheep in a place out of the market and not in a dwelling-place or shop in his occupation, and convicted him of the offence, and adjudged him to pay 1*s.* and costs.

The question for the Court was, whether the conviction is correct or wrong.

Forbes, for the appellant. This yard and these sheds were part of the dwelling-place of the appellant. They were parcel of his dwelling-house, and were within the curtilage. *Fearon* v. *Mitchell* (1), was a decision on the corresponding s. 13 of the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14), but there the person convicted was an auctioneer, selling by auction other people's cattle and sheep in a most extensive way; and it was therefore a very different case from the present sale of the appellant's own sheep on his own premises.

[QUAIN, J. The proviso, as to the sale of a horse in a stable, tends to shew that such a sale as the present is not within the exception of a sale in his own dwelling-place or shop; for a stable might just as well be part of the dwelling-place, if within the curtilage, as the present yards and sheds.]

(1) Law Rep. 7 Q. B. 690.

The proviso extends the exception to a sale in any stable, whether the seller's own or not.

The respondent did not appear.

COCKBURN, C.J. This is a somewhat doubtful case. I do not think there is any ground shewn why this yard and these sheds might not be considered parcel of the dwelling-house of the appellant. But the intention of the Act seems to be to prevent the sale of cattle and sheep otherwise than in the open authorized market. In the present case, if what the appellant has done were to be allowed any one might in effect set up a rival market. I think that this extensive sale of sheep or cattle is, in effect, included in what the Act intended to prevent; and although these premises may form part of the dwelling-house of the appellant in one sense, yet that they are not to be considered to be part with reference to the intention of the statute; and that the exception in the section must be taken to exempt only small dealings in a shop or dwelling-place, such as the sale of vegetables or meat. On the whole, therefore, I think the decision of the magistrate was right, and the conviction must be affirmed.

MELLOR, J. I also think the magistrate's decision was right. I cannot help thinking this was not a sale within the appellant's dwelling-place in the proper sense of that phrase as used in the statute. It is clear that the sale was not in a shop in any sense, and the appellant must rely on "dwelling-place." But what my Brother Quain pointed out in the proviso as to the sale of a horse tends to shew that such a sale as the present was not intended to be within the exception.

QUAIN, J. I am of the same opinion. I think this cannot be said to be a sale either in a dwelling-place or shop within the meaning of the statute; the exception cannot be taken to extend to such an extensive sale in a yard, although it may be attached to a dwelling-house; the sale of cattle and sheep in such large numbers is in effect a rival market, and not a selling in a shop or dwelling-place.

Judgment for the respondent.

Solicitors for appellant: *Bell, Brodrick, & Gray.*

1875
Nov. 13.

THE QUEEN *v.* THE OVERSEERS OF CHORLTON-UPON-MEDLOCK.

Union Assessment Committee Act Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 7—*Expenses of Overseers in preparing Valuation List—Allowance by Vestry after Expenses incurred.*

2 QBD 367

Under the Union Assessment Committee Act Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7,—which enacts that "when the overseers of any parish incur any expense in making out any valuation list or supplemental list, under the provisions of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), with the consent of the vestry given by express resolution, after due notice, they may charge such expense, so far as the same may be authorized by the vestry, upon the poor-rate," &c.,—the consent of the vestry is sufficient, though given after the expenses have been incurred.

RULE calling upon the auditor of the South Lancashire and Cheshire Audit district, to shew cause why an item of disallowment made by him in the accounts of the defendants, the overseers of Chorlton-upon-Medlock, for the half year ending September the 29th, 1874, should not be quashed.

It appeared from the affidavits, that in the months of May, June, July, and August, 1874, the defendants, for the purpose of writing out and examining the correctness of a new or supplemental valuation list required by the assessment committee under the Union Assessment Committee Acts, 1862, 1864 (25 & 26 Vict. c. 103; 27 & 28 Vict. c. 39 (1)), incurred expenses for temporary writers,

(1) By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 13, the committee may from time to time require the overseers, assistant overseers, constables, &c., and any other persons having the custody of any books of assessment of any taxes or rates, parliamentary or parochial, or of the valuations of any parish, or having the collection or management of any such taxes or rates, to make returns in writing to the committee at such times and places as they may appoint, of all such particulars as they may direct in relation to such taxes, rates, or valuations . . . . and may require the persons having the custody of any such books as aforesaid, to make and transmit to the committee copies of or extracts from such books, &c.

By s. 26, the committee by their order may, from time to time, where they see fit, upon the application of any person aggrieved by the valuation list in force in any parish, or where they themselves think the same expedient, direct a new valuation of all or any of the rateable hereditaments in such parish, and a new valuation list in substitution for such valuation list as aforesaid, or a supplemental list in substitution for any part thereof or in addition thereto, to be made by the overseers, and the committee may in

stationery, &c., amounting to 35*l.* 9*s.* An account of these expenses was laid before a vestry meeting convened by the defendants, after due notice, in accordance with 27 & 28 Vict. c. 39, s. 7, and held September 24, 1874, and the expenses were allowed by the meeting, and the defendants authorized by the vestry by express resolution to charge them upon the poor-rate of the township.

In the December following, the auditor, notwithstanding the sanction of the vestry, disallowed 14*l.* 10*s.*, part of the expenses. (1)

Herschell, Q.C. (*Forbes* with him), shewed cause. Upon the true construction of s. 7 it was necessary that the expenses in question should have been authorized by the vestry before they were actually incurred. Expenses of which the vestry might well disapprove in the first instance, might be reluctantly allowed after they had been incurred, from an unwillingness to surcharge the officials. The legislature intended to exclude such considerations.

Maule, Q.C. (*Lumley* with him), in support of the rule. It is not necessary that the consent of the vestry should be given before the expenses are actually incurred. No one can be said to incur expenses till he is liable to pay them.

---

directing such new valuation, and the making of such new or supplemental valuation list, give and make all such or the like directions and provisions in relation thereto as they are authorized under this Act to give and make in relation to the valuations and valuation list first directed and authorized to be made under the Act.

By the Union Assessment Committee Act Amendment Act, 1864, 27 & 28 Vict. c. 39, s. 7, "When the overseers of any parish incur any expense in making out any valuation list or supplemental list, or in revising or valuing any of the rateable hereditaments of such parish, under the provisions of the Union Assessment Committee Act, 1862, with the consent of the vestry given by express resolution, after due notice, they may charge such expense, so far as the same may be authorized by the vestry, upon the poor-rate; and if no vestry meeting be held, or no decision arrived at on the subject, then to the extent which the assessment committee shall allow; provided that as regards the valuation of the property, no expense shall be so charged upon the poor-rate, unless the consent of such committee to the procuring of such valuation by the overseers shall have been given previous to the same being made.

(1) This disallowance had been brought up by certiorari; and the grounds of the disallowance were stated by the auditor in the return to the certiorari, but it is unnecessary for the purposes of this report to refer to them.

1875

THE QUEEN v. CHORLTON-UPON-MEDLOCK.

[COCKBURN, C.J. The section is badly drawn, but does not the overseer incur expenses when he gives the orders by which they are incurred?]

By the Union Assessment Act, 1862, ss. 13, 20, it is evident that the committee may require the overseers to incur expenses such as these, and if the sanction of the vestry is refused because the overseers do not apply before incurring the expenses, how can the order of the committee be complied with and the expenses be charged on the rates?

COCKBURN, C.J. I think the rule must be made absolute to quash the disallowance. The true view of the case seems to me to be, that the legislature puts a certain duty on the overseers, that of having these lists made out, making no provision for the payment of the cost of making them, except what is in s. 7 of the later Act. This section is ambiguous, but when it is considered, I think the construction put upon it by Mr. Maule is right. The overseers are bound to incur these expenses, and when they have incurred them, the legislature leaves it to the vestry to decide whether they shall be paid out of the poor-rates or not. It is the duty of the overseers in each case to come to the vestry; but as at present advised, it seems to me the same thing whether they go before or after the expenses are incurred. It was, therefore, not competent for the auditor to interfere with the power which the legislature has given to the vestry, and his decision must be reversed.

FIELD, J., concurred.

Rule absolute.

Solicitors for prosecutor: *Shaw & Tremellen.*
Solicitors for defendants: *Bower, Son, & Cotton.*

THE SCHOOL BOARD FOR LONDON, APPELLANTS; THE VESTRY OF ST. MARY, ISLINGTON, RESPONDENTS. 1875 *Nov.* 10.

Metropolis Local Management Act (18 & 19 *Vict. c.* 120), *ss.* 105, 250—"*Houses forming a Street*"—"*Owner.*"

The vestry of a metropolitan parish, having paved a new street, under 18 & 19 Vict. c. 120, s. 105, assessed the London School Board, in respect of a school-house, as being "owners" of one of "the houses forming the street." The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses (with gardens at the back of them) between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:—

Held, that the school-house, though not actually one of the houses "forming the street," yet practically formed part of it, within s. 105.

Baddeley v. *Gingell* (1 Ex. 319; 17 L. J. (Ex.) 63), followed.

Held, also, that the school board were "owners" within the definition in s. 250 of 18 & 19 Vict. c. 120.

CASE stated by justices of the county of Middlesex, under 20 & 21 Vict. c. 43.

A complaint was made by the respondents, the Vestry of the parish of St. Mary, Islington, against the appellants, the School Board for London, for that the board,—being the owners of the house numbered 127 and of the schools in Cottenham Road, which house and schools abut on and form part of the Cottenham Road, being a new street, within the meaning of 18 & 19 Vict. c. 120, "An Act for the better Local Management of the Metropolis," and also the several Amendment Acts of 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102, which has been laid out by the orders of the vestry,—have not paid to the vestry the sum of 261*l.* 1*s.*, being the proportion of the estimated expense, as determined by the surveyor of the vestry to be paid by the board, for providing and laying the pavement and making the road, in respect of the house and schools of which the school board are owners.

The complaint was made against the appellants under s. 105 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102).

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

By 18 & 19 Vict. c. 120, s. 105, the vestry or district board may under given circumstances pave a new street; "and the owners of the houses forming such street shall on demand pay to the vestry or board the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board."

By 25 & 26 Vict. c. 102, s. 77, where the vestry or board shall pave a new street under the powers of s. 105, "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do."

At the hearing of the complaint it was admitted on behalf of the appellants that they are the owners of the house No. 127, Cottenham Road, and land and school-buildings in the rear of that house and other houses in that road; that the resolutions of the respondents that Cottenham Road be made and paved under the authority of s. 105, and that the owners of the houses and land forming or abutting on such street should pay the amount of the cost of making such street according to the estimate determined by the surveyor of the vestry were duly passed; that the sum of 261*l.* 1*s.* was duly demanded of them; and that they had refused to pay the same.

The school-buildings and land consist of an area of about 29,500 square feet, being in general shape nearly a rectangular parallelogram, the length (speaking generally), from east to west, was 205 feet, and the width an average of 132 feet. The school-buildings occupy the north-western corner of the area, the rest being open yard or playground. Immediately to the south of this area, and between it and Cottenham Road, is a row of eleven small houses, with a garden or yard at the back of each. These houses front immediately upon Cottenham Road; the length of the frontage being 184½ feet, with a passage at the east end of 20½ feet, and the depth to the back of the yards about 64 feet. The most eastern house of the row is the house No. 127, belonging to the appellants. On the east side of this house is a passage way, 20½ feet wide and 64 feet long, leading from Cottenham Road into the east end of

the school-yard or playground, and so to the school-buildings. This passage is inclosed and shut off from the street by gates under the control of the appellants. There is no access to the school-buildings except through this passage.

The house No. 127 is let to a tenant, and has no connection with the school-buildings.

In December, 1873, the respondents resolved that the Cottenham Road be laid out as a new street under the provisions of the said Acts, and the amount of the estimated cost thereof, as apportioned on the appellants, was 10*l.* 14*s.* 9*d.*, as the owners of the house No. 127 in that street, and 250*l.* 6*s.* 3*d.* as the owners of the land and school-buildings in the rear, and of the land forming the passage or entrance from the street to the school-house, as forming part of and abutting on the said street.

It was stated on behalf of the respondents, and admitted by the appellants, that the school-buildings and land in question are assessed to the parochial rates as being in Cottenham Road, and that no appeal has been made against such assessment.

It was contended on behalf of the respondents that, under the authority of s. 105 of the Metropolis Management Act, 1855, it is in the discretion of the surveyor of the vestry for the time being to determine the amount of the estimated expenses of making any new street, and in the discretion of the vestry to determine how the proportion in which such expenses should be assessed on the owners of the different houses forming such street, or of the land abutting thereon, shall be calculated by resolving that the proportions in which each such owner should be assessed should be affixed either by the amount of the assessment to the parochial rates, or by the length of frontage to the street of each house or piece of land, or by any other method that may appear equitable to the said vestry, according to the circumstances of each particular case, and that it was not within the power of the justices to interfere with or review the acts of the vestry or surveyor in that behalf.

It was admitted by both parties that, in the calculation of the proportion of the cost of making the street, the same was made not on the length of the frontages to the street, but on the assessment of the respective properties to the parochial rates.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

It was contended by the appellants that they were not liable for the rate as levied on the said schools and land, as they were not, as owners of the said schools and land, owners of "houses forming the street" within the meaning of 18 & 19 Vict. c. 120, s. 105, and that if they were liable at all, they were only liable for a rate levied in respect of frontage.

Under these circumstances, the justices considered that the appellants came within the provisions of the above sections, and that the respondents were entitled at their discretion to apportion the cost either in proportion to the assessment of the properties or according to frontage. They therefore made an order upon the appellants for the payment of the sum of 261*l.* 1*s.*—viz. 10*l.* 14*s.* 9*d.* in respect of the house No. 127 in Cottenham Road, and 250*l.* 6*s.* 3*d.* in respect of the school-buildings—as the proportion of the estimated expense of providing and laying the pavement and making the road in the new street.

The question for the Court is whether the appellants, as owners of the land and school-buildings, are, as owners of a house forming such new street within the meaning of 18 & 19 Vict. c. 120, s. 105, or under 25 & 26 Vict. c. 152, s. 77, as owners of land abutting on such new street, liable to be rated for the making of the street; and if they are, whether the rate or amount should be assessed, at the discretion of the respondents, upon the amount of the frontage or upon the rateable value of the land and school-buildings.

If the Court shall decide in the affirmative, the order for the payment of the whole amount claimed by the respondents is to be carried into effect.

If the Court shall decide otherwise, an order is to be made for payment of the sums offered to be paid by the appellants, that is to say, 10*l.* 14*s.* 9*d.* in respect of the house No. 127 Cottenham Road, and the sum of 10*l.* 14*s.* 9*d.* in respect of the adjoining piece of land or passage way, or such other order to be made as may be directed by the Court.

Nov. 6, 10. *Sir H. James, Q.C.* (with him *Marriott*), for the appellants. By s. 105 of 18 & 19 Vict. c. 120, when a new street is to be paved, the expenses are to be borne by "the owners of the houses forming such street;" and by s. 250, "owner" "shall . . .

mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." By s. 77 of 25 & 26 Vict. c. 102, "the owners of the land bounding or abutting on such street shall be liable to contribute towards the expenses, as well as the owners of houses therein"; but the vestry or board have a discretion to charge the owners of land in a less proportion. First, the school board are not "owners" at all within the definition.

[*Thesiger, Q.C.*, contrà. This point was not intended to be raised; the only question is whether the school-house is so situate as to be within s. 105.]

In the *Plumstead Board of Works* v. *British Land Co.* (1), in the Exchequer Chamber, Lord Coleridge, C.J., after citing *Angell* v. *Paddington* (2), uses language which shews that when the house or land cannot be let at a rack rent, the trustees are not owners within s. 105.

[COCKBURN, C.J. If that case goes the length of deciding that wherever houses in a street are vested in persons so that they cannot let the premises, but must occupy them for the purposes of the trust, they are not owners within the statute, I can only say that I am bound by the decision, being in the Exchequer Chamber, but I cannot accede to the reasoning.

MELLOR, J. Cannot the school board, supposing they found these premises not convenient, have another school-house elsewhere, and let these premises for some other purpose?]

So long as the building is used as a school-house they cannot let it; but it must be admitted that by s. 22 of 33 & 34 Vict. c. 75, they seem to have the same power as to sale, leasing, and exchange as the Charity Commissioners.

[COCKBURN, C.J. Leasing must mean leasing at a rack-rent.]

Secondly, on the main question, it is impossible to say that the school-house is one of the houses forming the street called Cottenham Road within s. 105, or that the area of ground in which it is situate is land bounding or abutting on the street within s. 77. The passage, no doubt, may be land within s. 77; but the respon-

(1) Law Rep. 10 Q. B. 203. (2) Law Rep. 3 Q. B. 714.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

dents have assessed the school-house and the large plot of land, and the question is, whether that is right. How can this school-house be said to form the street when there are houses which form the street between it and the street?

THE COURT then called upon

Thesiger, *Q.C.* (with him *Besley*), for the respondents. The first point was not intended to be left open, otherwise the power of the board as to leasing would have been set out in the case. The Court has, however, disposed of the point; and if any authority were wanting, the case of *Bowditch* v. *Wakefield Local Board* (1) is expressly in point, that the school board are "owners" within ss. 105 and 250. On the real point the respondents rely mainly on s. 105, and contend that this school-house is a house forming a street within the meaning of that section. À priori, the legislature would intend that the owners of house property benefitted by the paving of the street should contribute to the expenses; and as the only access to the school is by this passage from this particular street, it is clear that as much benefit is derived by the house from the paving of the street as if the house fronted entirely on the street.

[MELLOR, J. That argument would make all the chambers in the Inner or Middle Temple form part of Fleet Street, although there is but one set of chambers actually fronting the street.]

That is a very different case from the present. Here there is but one private entrance to a single house; just as is the case with many of the hotels in Paris, and some of the large mansions, such as that of the Duke of Westminster, in London, where there is an entrance fronting the street much narrower than the house which stands back from the street. That house may well be said to form part of the street, although the case would be very different as to the houses similarly situate in a court with a public entrance from the street. It may be observed in support of this view that actual frontage is not the criterion, and that the mode of rating is left open to the vestry and cannot be reviewed: *Nesbitt* v. *Greenwich Board of Works* (2); and to charge the expenses in proportion to the rateable value seems a juster mode of assessment than charging in proportion to the mere frontage. Practically, then, and in ac-

(1) Law Rep. 6 Q. B. 567. (2) Law Rep. 10 Q. B. 465.

1875

LONDON [SCHOOL [BOARD v. ST. MARY, ISLINGTON.

cordance with principle, and in the sense intended by the legislature, the school is within s. 105, and forms part of the street. This was the principle of the decision in *Baddeley* v. *Gingell.* (1) The Act there in question gave power to impose a rate for the paving of streets in the district upon the inhabitants of houses and other buildings "situate or being within the streets," and the premises in question were situate with regard to the street to be paved almost precisely as the present, except that the passage was not more than half the width of the present, and there was more than one house or building at the back. There were also, with exception of the opening for the gateway, houses fronting the street between it and the houses to be rated. The arguments were similar to the present, that the house and buildings in question were not "within the street;" and the argument contrà, on which the Court acted, was that the principle of the enactment was that the legislature intended that those who got the benefit should contribute towards the expense of paving the streets; and the Court held that the house and buildings, though not entirely, were practically within the street for the purposes of the Act, although the passage, as here, was the only part of the premises actually fronting or abutting on the street. [The learned counsel then read at length the arguments, and dicta, and judgments in that case.] The principle, therefore, of that decision seems to apply directly to the present case. Just as the passage there made the whole premises "within the street" for the purposes of that Act, so the passage here makes the school-house part of the street within the meaning of this Act. (2) [He also cited the judgment of Quain, J., in *St. Mary, Islington*, v. *Barrett* (3), Holroyd, J.'s judgment in *Doe* d. *Humphreys* v. *Roberts* (4), and definition of "street" in s. 250 of 18 & 19 Vict. c. 120.]

Marriott in reply. But for the case of *Baddeley* v. *Gingell* (1) the argument for the respondents would be altogether wanting in

(1) 1 Ex. 319; 17 L. J. (Ex.) 63.

(2) The legislature, in the two statutes seems to have treated "houses forming such street" in s. 105 of 18 & 19 Vict. c. 120, as equivalent to "houses in," or "within such street," for in s. 77 of 25 & 26 Vict. c. 102, after referring to s. 105 the owners of the land bounding or abutting on such street are made liable to contribute, "as well as the owners of houses *therein*."

(3) Law Rep. 9 Q. B. at p. 283.

(4) 5 B. & Ald. 411.

1875

LONDON SCHOOL BOARD v ST. MARY, ISLINGTON.

authority. But the words, "the houses within the street," are very different from "the houses forming the street." (1) In former statutes, in pari materia, the words had been "fronting," or "bounding or abutting on;" "forming the street," no doubt, was intended to have the same meaning.

[COCKBURN, C.J. The inference is rather the other way, that the words "forming the street" were intended to have a different, and perhaps a wider, meaning.]

The widest definition is given to the word "street" in the interpretation clause, s. 250; and if houses situate like the present had been intended to be included as in a street, some definition which would include them would have been given. It is putting the greatest violence on language to say that a house which is wholly shut out from the street, having houses fronting the street interposed between it and the street, is one of the houses forming the street, merely because it has a passage of twenty feet opening into the street. It is to be observed that this passage does not open immediately upon the school-house; the passage opens into one end of the large yard, and the house is at the other end of the yard, behind the last of the eleven houses in front.

COCKBURN, C.J. I think, upon the whole, the rate must be upheld. I own that my mind has fluctuated very much in the course of the discussion, and I by no means intend to say that at this moment my view of the matter is free from doubt. Upon the whole I think the reasons which influence us in upholding this rate, and in putting the construction upon the Act of Parliament which we are prepared to do, are sound. The words are "the houses forming such street." I think it must be admitted it is not open to contest that a house, standing in the position which this school occupies, does not physically and actually form part of the street, taking "street" in the sense in which I think it ought to be taken, namely, one of the houses between which the part to be paved is situate,—supposing that it is a street formed of opposite rows of houses; or, if it be not, then that part which is occupied by the highway, as distinguished from the houses. I think it cannot be said that physically and actually a house stand-

(1) See note (2), ante, p. 71.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

ing in the position of this school can form part of the street. But looking to what I cannot help thinking, amid the varying terms and varying phraseology of these Acts, was the intention of the legislature, we are entitled to say that the houses may constructively form part of the street which physically is not included by them. The case of *Baddeley* v. *Gingell* (1), is not immediately and directly in point, because the words of the two Acts of Parliament are not identical, but I cannot help thinking that, practically, whether a house is said to be within the street or in the street, or spoken of as forming part of the street, it all means one and the same thing. We must look at the justice and the equity of the case, and consider whether a person being the owner of premises so circumstanced should be made to contribute to the paving of the street, it being clearly the intention of the legislature that the owners of property immediately contiguous to the highway to be paved, and forming part of the street of which that also forms part, shall pay, upon the assumption that they personally are benefitted by having put into proper order the street which affords them access to their habitation and premises. That being so, it matters nothing in point of the justice of the case that the house, instead of actually fronting the street, stands in the rear of the street, if it has its access from the street. It is the benefit of access to the premises which must be supposed to be the foundation of the liability which the legislature thinks fit to impose. It is essential to you to have premises to which the access is from that part of the street which is called highway; it is essential to you that you should have that street well paved, and you get access; it matters nothing practically whether your front door opens actually on to the street, or whether you go up a passage to get to your front door, you equally get the benefit of the street every time, whether on foot or in a carriage, you make use of the street as an access to your house. That being so, although I agree in the strict sense of the term this school does not actually form part of the street, I think constructively it does within what, as I imagine, must have been the view of the legislature. The old Acts had the term "fronting the street." That has been omitted, and the words "forming the street" substituted. I think, therefore, that we may put a large

(1) 1 Ex. 319; 17 L. J. (Ex.) 63.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

and liberal construction upon these terms, and hold that constructively this house forms part of the street. For all practical purposes, with regard to postal matters, and things of that sort, it would be deemed to be a house in the street. I can conceive that there might be behind part of the houses which front to the street valuable property, access to which would be all-important to the owner. The state of the street out of which he gets to his premises may be all-important to him, yet if the argument against this rate were upheld, he would be relieved from all contributions towards that which is a matter of common concern, and from which he, in common with the rest, derives a benefit.

I was very much staggered at first with the consideration, that there are, as every one knows who walks along the streets of London, a great many courts, access to which is from the main street, but if you go into them you will find that in these courts is a congeries of buildings of various forms and shapes, quite distinct from and independent of the street. I do not think, where you have got an old-established court, the access to which from the street is common to the public, open to everybody who likes to go in, that that would fall within this category. If it did, I should hesitate to put the construction upon the Act which I am now prepared to put; I do not think it applies to courts of that description. Here we are dealing with private property. The access here is by a private way. It has never been constituted a public thoroughfare, and perhaps never may be. It is a private access to private property, and this private access, to my mind, is the same thing as though the front door opened upon the street. If the front door stood where the private passage does, and the rest of the house stood behind the houses which otherwise form the street, I think the case would be clear. The house would in that sense front the street, and might well be said to form part of the street. I do not think it does so the less because, when you get to the end of this passage, you have to turn to the right hand or to the left to get to the front door. Therefore, thinking we may put this construction on the Act of Parliament, and without affirming that a house in this condition is properly described as forming part of a street, having regard to the equitable and just

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

view of the matter, and the one best calculated for the public convenience, I think this rate should be upheld.

MELLOR, J. I am of the same opinion. I think this is an à fortiori case to that of *Baddeley* v. *Gingell* (1); and, quite independently of that case, I think I should be disposed to come to the conclusion at which my Lord Chief Justice and my Brother Quain have arrived. I cannot help thinking that many of the arguments which have been addressed to us are considerations which may be taken into account by the vestry in assessing the quantum of the rate. I think this school-house may be said to form part of that street. It is true there is an inferior building in front of it, and it is in a space behind the immediate row of houses; but there is reserved an opening to the school-house, and that is the only access to the school and school-house premises for all purposes. I think they have the same benefit that any immediate frontager has; and I cannot help thinking that the variations in the Acts of Parliament referred to make very much against Mr. Marriott's argument. I think the omission of the words "frontage" and "fronting the street"—changing that expression, and leaving it out of an Act of Parliament—is very strong to shew that the intention of the legislature was that a different construction should be put upon the words used in this case on the subject-matter to be provided for. Those Acts of Parliament in which various words are used, some of them for sanitary purposes, and others for local government purposes, may be sufficiently clear for all purposes intended to be accomplished by them. But the object of this Act is for the first time to pave a street which has been formed by houses built on either side, or both sides; and I cannot help thinking that, for such a purpose, it is reasonable and just it should not be confined simply to those who are actually frontagers. In one sense it is true a portion of this property is frontage property, because, whatever the number of feet may be by which the access is given which is the private property of the school board, that is really a frontage. I am quite satisfied that where a building derives its access and the whole benefit of the access from a street newly formed and laid out, it would not be

(1) 1 Ex. 319; 17 L. J. (Ex.) 63.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

giving full effect to the words "forming the street" if we gave it any other sense than that which we now do.

I was struck with the hardship,—and that may be a question for the consideration of the vestry,—that would arise supposing a change of circumstances were to take place, and there was a new access from a street at the back and at the side. I think the possibility of that change of circumstances might well be considered in the way in which the vestry should assess these premises. I think those are considerations which they might well take into account.

But upon the whole of the circumstances, I have come to the conclusion, which is satisfactory to my own mind, that this is the true meaning of the Act of Parliament, and that the rate is properly made.

QUAIN, J. I am of the same opinion. I think Mr. Marriott admitted that unless he could distinguish this case from it, *Baddeley* v. *Gingell* (1) is almost decisive of the case, although not a binding authority upon us. The whole argument, as I understand Sir Henry James and Mr. Marriott, went merely on the words "forming the street;" they say that this school-house does not form any part of the street at all, construing those words as if they were "forming the line of the street." But the words are not "forming the line of the street;" the words are merely "owners of houses forming the street," that is, constituting the street in the ordinary sense of the word. And people might well be said to live in the street, although not fronting that street, if their sole access was from that street. I think the question of sole access from the street is the governing idea, whether we should say it is within the street or not. And this being a private access and a private passage from the street, it seems to me, as was suggested by the Lord Chief Justice, to be the same thing as if they enlarged their house and brought their front door to the street, although the largest portion of the house was behind and not immediately fronting the street.

For these reasons, therefore, I think, substantially, and looking at the object of the Act of Parliament, that people who get the

(1) 1 Ex. 319; 17 L. J. (Ex.) 63.

benefit from the paving should contribute. The board get a material benefit, because they use that street for their sole access. I think substantially, and looking at the words of the statute, we ought to give a wide construction to the words, and therefore uphold this rate.

1875

LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON.

Judgment for the respondents.

Solicitors for appellants: *Gedge, Kirby, & Millett.*
Solicitor for respondents: *John Layton.*

BERRY *v.* THE EXCHANGE TRADING COMPANY.

Dec. 17.

Practice—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *Schedule, Order LIII., rules* 2, 3—*Failure to appear in Court after giving Notice of Motion—Costs.*

Where notice had been given of a motion before the Court to rescind a judge's order, and the parties giving the notice did not appear, the Court ordered them to pay the costs of the other party appearing to shew cause against the motion.

THE plaintiff, on the 11th of December, obtained a judge's order under the Supreme Court of Judicature Act, 1875, Order XIV., rule 1, empowering him to sign judgment, notwithstanding the defendants' appearance. The defendants then gave notice to the plaintiff that on Tuesday, the 14th of December, they would move the Court to rescind the order.

Shortt, for the plaintiff, on December the 17th, stated that the defendants had not appeared in court on Tuesday, or up to the present time. There appeared to be no form, in the Supreme Court of Judicature Act, 1875, schedule, of any order dismissing the motion where the party giving notice did not appear.

PER CURIAM (Blackburn, Quain, and Archibald, JJ.): We order that the defendants do pay the plaintiff or his attorney their costs of appearing to shew cause against the motion.

Order accordingly.

Solicitors for plaintiff: *Milward & Whitehead.*

1875
Dec. 14.

Re PHILLIPS and GILL.

Practice—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict.* c. 77), *Schedule, Order I., rule* 3—*Order LIII., rule* 3—*Motion for Rule to shew Cause—Rule to pay Money awarded under Reference without legal Proceedings.*

9 QBD 336

A rule to pay money awarded under an agreement of reference (which has been made a rule of Court) is a rule to shew cause, and no notice of application for such rule need be given.

Disputes between two partners named Phillips and Gill had been referred to arbitrators under a clause in the partnership articles, and the arbitrators awarded that Gill should pay Phillips a sum of money. The submission had been made a rule of Court.

C. Hall moved for a rule calling upon Gill to shew cause why he should not pay the money. The application is for a rule nisi, as Order LIII., rule 2 (1), only applies to actions, and here there is no action.

Per Curiam (Blackburn, Quain, and Field, JJ.): The application is made in the proper form, and a rule nisi will be granted.

Rule nisi granted.

Solicitors for applicant: *J. E. Fox & Co.*

(1) The Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), 1st Schedule, Order I., after providing for the commencement of actions and interpleader proceedings, by rule 3 enacts that "all other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed."

By Order LIII., rule 2, no rule or order to shew cause shall be granted in any action except in the cases in which an application for such rule or order is expressly authorized by these rules. By rule 3, except where by the practice existing at the time of the passing of the Act, any order or rule has heretofore been made ex parte absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to shew cause only, no motion shall be made without previous notice to the parties affected thereby.

SMITH *v.* COOK. 1875 Dec. 14.

Agistment—Placing Horse among Horned Cattle—Horse gored by Bull—Defect of Fences—Liability of Agister—Absence of Scienter.

The defendant, an agister of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff:—

Held, that the fact that the defendant had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of the plaintiff's horse.

DECLARATION that the plaintiff delivered a horse to the defendant to be agisted, kept, and taken care of; that the defendant for reward promised to take care of it, but that he took such bad care of it that it was killed.

The pleas denied the promise and the breach. Joinder of issue.

At the trial before Blackburn, J., at the London sittings after Hilary Term, 1875, it appeared that the plaintiff, a farmer, had been in the habit of sending horses to be agisted on marsh land at Plumstead, Woolwich, in the defendant's occupation. In June, 1874, the plaintiff sent two horses, one a colt, to the defendant's premises. The colt was placed in a field of twelve or thirteen acres with several heifers, and on the 19th of July was found dead, having been to all appearance gored by a bull. There was a bull on land adjoining the defendant's marsh, and separated from it by a shallow ditch. The defendant knew that the bull had been several times found on his land, the ditch not being sufficient to keep it out, but there was no evidence that the bull was of a mischievous disposition. Witnesses were called by the plaintiff, who stated that it was imprudent to turn young horses among horned cattle; and witnesses for the defendant stated that it was usual to do so upon marsh land, and that there was no danger in such a practice.

The learned judge left to the jury the questions whether the colt was killed by the bull, and whether the defendant acted

1875

SMITH v. COOK

without reasonable and proper care in putting the colt in the field near the bull and with the heifers.

The jury found for the plaintiff, damages 50*l.*, leave being reserved to the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly, on the ground that there was no evidence of scienter, and that such evidence was necessary to maintain the action, or for a new trial on the ground that the verdict was against the weight of evidence,

Bray (*Murphy, Q.C.*, with him), shewed cause. The plaintiff is entitled to retain the verdict. Proof of the scienter is unnecessary. The action is not founded upon any breach of duty on the part of the defendant as the owner of a mischievous animal; the relation between the plaintiff and him was that of bailor and bailee, and the action is founded on contract. The defendant's contract is to take reasonable care; he measures the risk from various quarters, including that from ferocious animals, and fixes his remuneration accordingly. There may be reasons why duties as between neighbours should not be too onerous; but where the relation is one of contract no such reasons exist. Again, it may be too much to presume that an ordinary bull will attack human beings, but in the present case it was natural and probable that the bull should attack the horse whilst it was among the heifers. The owner of horses is liable for the ordinary consequences of their trespassing, even where they injure other horses: *Lee* v. *Riley* (1); *Ellis* v. *Loftus Iron Co.* (2) The propensity of a bull to attack horses under circumstances like the present is not necessarily a vice. In the American case of *Dolph* v. *Ferris* (3) it was held that if a bull break into an inclosure and gore a horse, the owner of the bull is liable, and in the judgment of the Court, Kennedy, J., after reviewing the authorities, says: "Indeed, I am not satisfied that every owner of a bull is not bound to keep him confined, so that he shall not run at large or trespass upon the lands of others. The propensity of this animal to rove, and to break into the inclosures of others, especially where cows may be feeding, is notorious; and that when thus suffered to rove about,

(1) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(2) Law Rep. 10 C. P. 10.

(3) 7 W. & Serg. (Pennsylvania) 367.

1875

SMITH v. COOK.

it is also notorious that it happens only too frequently that he will attack horses with his horns if they come in his way, and as sure as he does they seldom escape death or serious injury."

[BLACKBURN, J. Those observations certainly go to shew that the verdict was not against the weight of evidence.]

In another American case, *Barnes* v. *Chapin* (1), where a colt was kicked and killed by a mare which had been turned loose on the highway without a keeper, it was held that the owner of the mare was liable, though it was not vicious. The law as to mischievous animals cannot interfere with freedom of contract.

J. J. Powell, Q.C., and *Shaw*, in support of the rule. The defendant is not liable. It has always been held that there is no breach of duty in not guarding others against the violence of cattle or other beasts which are not known to be of a fierce disposition. Where the action is founded on contract, proof of knowledge or want of knowledge is equally essential. In a very early case, *Buxendin* v. *Sharp* (2), where the plaintiff declared that the defendant kept a bull that used to run at men, but did not say sciens, or scienter, the declaration was held bad after verdict. And recently, in *Cox* v. *Burbidge* (3), where a horse straying on a highway kicked a child, the owner was held not liable unless he knew that the horse was of a vicious temper. The case of *Lee* v. *Riley* (4) was an action of trespass, but here the defendant has been guilty of nothing in the nature of a trespass. The defendant did not insure the safety of the horse, the liability of an agister is simply to take care of the animals entrusted to him: *Corbett* v. *Packington*. (5)

BLACKBURN, J. I think that in this case the rule must be discharged. The defendant is sued as an agister of horses, and although such an agister does not insure the safety of the horses intrusted to him, he is bound to take reasonable care of them, and if they are killed through his negligence, he is liable. At the trial it was proved that he received a young horse from the plaintiff,

(1) 4 Allen, 444.
(2) 2 Salk. 662.
(3) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.
(4) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
(5) 6 B. & C. 268.

1875

SMITH v. COOK.

and put it into a field of twelve or thirteen acres with a number of heifers, well knowing that a bull in the adjoining land was in the habit of visiting these heifers, and that there was nothing to keep him out of the field. It seems clear that this bull, either because the horse happened to come between him and the heifers, or for some other reason, attacked and killed it. The first question is whether there was evidence of negligence on the part of the defendant. Now, a large body of witnesses, comprising people acquainted with marsh land, said that in their opinion it was imprudent to turn young horses among horned cattle; and there was counter evidence for the defendant. One of his witnesses, indeed, stated that a horse was sometimes put into a field with twenty or thirty bulls and heifers, but I think he rather injured his own side. It is impossible to lay down a rule for every case. The jury must be taken to have found that there was negligence, and I am not prepared to quarrel with their finding, as I should probably have come to the same conclusion myself.

Then the second question relates to the law (settled by authority rather than by reason), that although the owner of an animal, such as a cow, which he allows to roam about, is responsible for damage caused by its trespassing, yet that in the case of animals not of mischievous nature, he is entitled to suppose that they will not injure any one until he has had actual knowledge to bring him to a contrary opinion. Knowledge of the fierceness of the animal, called in pleading the scienter, was long ago held to be necessary. There is a case in Dyer's Rep. 25, pl. 162, where it was so held, and in the margin of that case there are references to earlier authorities in the Year books, and to the Book of Exodus, c. xxi. v. 29. I suppose that this law was suited to the convenience of earlier times, when cattle were left to wander about on open commons, and it was thought that the mere fact that bulls sometimes toss people was not by itself enough to make their owners liable for their acts. The question is: Does this principle oblige us to hold as a matter of law that it cannot be negligence on the part of an agister of horses to assume that bulls and cows are likely to be quiet, and to put a horse among them? I think that this proposition is a non sequitur upon the law as to mischievous animals. I do not say that

the defendant's act would in all cases necessarily be negligence, but it is a question of fact whether he took sufficient care or not, and the doctrine of scienter, which, as I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care. The cases which have been cited to us do not throw much light on the subject. *Lee v. Riley* (1) is the nearest to the present case, but there there was no question of negligence, the injury was the natural consequence of allowing the animal to be at large. It might be argued from that case and from *Dolph* v. *Ferris* (2), which has been cited, that the owner of a bull who allowed it to escape would be liable if it attacked a horse, and à fortiori he would be liable if he put the horse in a field with the bull, and this is very much what the defendant did.

QUAIN, J. I am of the same opinion. I quite agree that this action is founded on negligence, on a breach of the contract by the agister to take proper care, and the question is whether he did take proper care or was guilty of negligence. Mr. Powell argues that there could be no negligence unless the defendant knew that the bull was a mischievous animal, and endeavours to bring the facts before us within the class of cases relating to mischievous animals. But the question in the present case is different. In *May* v. *Burdett* (3) Lord Denman sums up the authorities which relate to mischievous animals, saying, "The conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief negligence is presumed without express averment." And the Court of Exchequer in *Jackson* v. *Smithson* (4), gave immediately afterwards a decision to the same effect, that the cause of action for keeping a mischievous animal was not founded on negligence, which need not be averred. The liability of the owner of a mischievous animal being therefore unconnected with negligence, there is no authority for importing the law relating to this liability into an action which is founded

(1) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(2) 7 W. & Serg. (Pennsylvania) 367.

(3) 9 Q. B. 101, 112; 16 L. J. (Q.B.) 64.

(4) 15 M. & W. 563.

1875

SMITH v. COOK.

upon negligence. The case might have been stronger if the defendant had known that the bull was mischievous, but the evidence of negligence was quite sufficient.

FIELD, J. I am of the same opinion. As regards the evidence the verdict of the jury is quite satisfactory, and the only remaining question is whether the fact that the defendant did not know that the bull was accustomed to attack horses entitled him to have the verdict entered in his favour. The authorities establish that the owner of tame beasts is not answerable, without proof of the scienter, for injuries which they inflict on the person of others; but the present action is founded on the bailment of a horse, from which a contract to take reasonable care of it is implied. Now, the defendant put this horse in a field knowing that within range of the field there was a bull, and that within the field there were heifers, and knowing that the bull would naturally come into the field, and was in fact in the habit of so coming. He says, I did not know that the bull would attack a horse. But all that it is necessary for the plaintiff to make out is some want of reasonable care, and this I think he succeeded in doing. The rule must be discharged.

Rule discharged.

Solicitors for plaintiff: *May, Sykes, & Batten.*
Solicitor for defendant: *S. W. Johnson.*

Nov. 20.

BOSLEY, APPELLANT; DAVIES, RESPONDENT.

Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 17—"*Suffering Gaming*" *on Licensed Premises—Proof of Knowledge on the Part of Innkeeper.*

In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17,—by which if any person licensed under the Act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties,—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises.

At the hearing of an information against the appellant, an hotel keeper, for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could

see three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went upstairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The appellant having been convicted:—

Held, that the case must be sent back to the justices with an intimation of the opinion of the Court that, though actual knowledge on the part of the appellant or his servants, in the sense of seeing or knowing of, the card playing, was not necessary to be shewn, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on.

CASE stated by justices of Hereford under 20 & 21 Vict. c. 43.

An information,—preferred by the respondent, superintendent of police for Hereford, against the appellant, a person duly licensed for the sale of intoxicating liquors by retail, under the Licensing Acts, 1872, 1874, as the managing director of the Green Dragon Hotel Company, Hereford, under s. 17 of the Licensing Act, 1872, charging that he on the 1st of July, 1875, being a person duly licensed for the sale of intoxicating liquors by retail, did unlawfully suffer gaming on his licensed premises,—was heard, and the appellant convicted and adjudged to pay a penalty of 1*l.* and 10*s.* 6*d.* costs, or in default of payment to be imprisoned for fourteen days.

Upon the hearing it was proved on the part of the respondent that George Barroll, a police constable, about half-past twelve in the morning of the 1st of July, was on duty in Broad Street, Hereford, in which street the appellants licensed premises, called the Green Dragon Hotel, are situate, and heard laughing and shouting proceeding from the Green Dragon Hotel. He then went opposite the Green Dragon, and heard noises and voices in a room with three windows facing the street. Two of the windows had the blinds up a part of the way, so that the constable saw three of the gentlemen who faced the street, and from what he heard, knew that there were several gentlemen playing at cards. He waited about a quarter of an hour, when the front door was opened by one of the waiters, who came out, and the constable entered and went upstairs direct into the room where the gentlemen were, and he there found six gentlemen round a table play-

1875

BOSLEY v. DAVIES.

ing at cards, with a lot of money on the table, and also drink. He asked them for their names; some of them refused, but at length they all gave their names. When the constable came downstairs he met Miss Clarke, the manageress, who, he stated, was angry with him, and told him he had no right to go upstairs without first coming to her, and took his number and said she should report him. She said she did not know they were playing at cards, and that they did not have the cards of her. The constable said they were making a great noise, and it could be distinctly heard in the street that they were playing at cards.

The appellant's attorney admitted that the gentlemen were playing at cards, and that they were playing for money, but contended that it was necessary that the gaming should be carried on with the knowledge of the appellant or the manageress, or other persons employed in the hotel, and quoted the case of *Avards* v. *Dance*. (1) The respondent, however, drew the attention of the justices to the circumstance that the 17th section of the Licensing Act, 1872 (2), did not contain the word "knowingly," as did the repealed statute (9 Geo. 4, c. 61, s. 21, schedule (C)), and as do some of the sections of the present statute with reference to other offences.

The appellant's attorney afterwards called in defence two witnesses; first, Mr. B. T. Featherstone of Harwick, one of the gentlemen in question, who stated that he and the other gentlemen were staying at the Green Dragon Hotel, having come to Hereford for a game of cricket, and they had a private room and dined there that evening; that cards were produced by a Mr. Walker, one of the gentlemen, and that they played for money, and that he did not think that anybody in the house knew they were playing at cards; but in cross-examination he said as follows: "I did not see the waiter come in. We had all our drinkables. He came in just

(1) 26 J. P. 437.

(2) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, if any person licensed under the Act "suffers any gaming or any unlawful game to be carried on on his premises," he is made liable to a penalty not exceeding for the first offence 10*l*., and for the second and any subsequent offence 20*l*.

The form of innkeeper's licence given by 9 Geo. 4, c. 61, schedule (C), contains the proviso inter alia that he do not knowingly suffer any unlawful games or any gaming whatsoever in his house or premises.

after the police constable came in. I fancy it was a short waiter. I don't recollect that any brandies were brought in. Just before we commenced playing our brandies and sodas came in." Secondly, Miss Elizabeth Clarke, the manageress, was called, and proved that she did not supply the cards, and that she had no knowledge of the card-playing until she saw the policeman.

No waiter was called, nor the gentleman who produced the cards, nor any other person who might have had access to the room, and on the above facts the justices convicted the appellant.

The question was, whether under the 17th section of the Licensing Act, 1872, it was incumbent on the part of the respondent to prove actual knowledge on the part of the appellant, or some authority of the hotel, of the fact of gaming, so as to render the appellant liable under that section.

If the Court should be of opinion that proof of such knowledge was necessary, then the information was to be dismissed.

Poland, for the appellant. Under s. 17 it is necessary to support a conviction that there should be actual knowledge on the part of the innkeeper that gaming is being carried on on his premises. How can he be said to suffer a thing of which he is ignorant? No doubt there are matters where ignorance is no excuse; for example, the fact that the house is kept open within prohibited hours.

[COCKBURN, C.J. A man may be said to "suffer" a thing to be done, if it is done through his negligence.]

There is no evidence that the waiter, or any one employed in the hotel, knew of the card-playing. The case of *Avards* v. *Dance* (1),—where a landlord was convicted for allowing gaming, contrary to the terms of his licence, which contained the proviso that he should not knowingly suffer any gaming on his premises, —is an authority to shew that under a similar provision knowledge on the part of the person charged is material. The omission of the word "knowingly" in s. 17 is immaterial, and was probably unintentional.

Sawyer, for the respondent. A conviction is good under this section without proof of knowledge on the part of the landlord.

(1) 26 J. P. 437.

1875

BOSLEY v. DAVIES.

He can only discharge himself by proving that he has taken every reasonable precaution to prevent gaming on his premises. The case of *Mullins* v. *Collins* (1) is an authority to shew that the landlord is liable under s. 16 if his servant knowingly supplies liquor to a constable on duty without the authority of his superior officer. The question whether the publican could be convicted if the servant had no knowledge that the constable was on duty is left open by Blackburn, J. The object of the statute was to prevent gaming from being carried on in licensed premises: *Reg.* v. *Ashton.* (2) This is not a case in which the mens rea is material: *Fitzpatrick* v. *Kelly.* (3) The word "knowingly" was, in s. 17, intentionally omitted by the legislature.

Poland, in reply. *Fitzpatrick* v. *Kelly* (3) has no bearing on this case. In that case there was a legal obligation to supply unadulterated butter, and the scienter was immaterial. Here the duty is only that of taking reasonable precaution.

PER CURIAM (Cockburn, C.J., Mellor and Quain, JJ.) The case must be sent back to the justices with an intimation of the opinion of the Court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge.

Case remitted accordingly. (4)

Solicitor for appellant: *Fortune, for Gwillim, Hereford.*
Solicitor for respondent: *G. F. Cooke.*

(1) Law Rep. 9 Q. B. 292.
(2) 1 E. & B. 286; 22 L. J. (M.C.) 1. 501.
(3) Law Rep. 8 Q. B. 337.
(4) See the next case.

REDGATE, APPELLANT; HAYNES, RESPONDENT. 1876

Intoxicating Liquors (Licensing) Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—"*Suffering*" *Gaming on licensed Premises—Evidence to support the Charge.* *Jan.* 19.

The appellant was charged under s. 17 of the Intoxicating Liquors (Licensing) Act, 1872 (35 & 36 Vict. c. 94), with "suffering" gaming to be carried on on her premises, an hotel at Epsom. It was proved by witnesses that, while standing in the public street at Epsom between half-past one and a quarter to two in the morning, they could hear the conversation of three persons in a room in the hotel. These three persons were a horse trainer, a jockey, and a gentleman of Newmarket, and from what was heard of their conversation, it was evident that they were playing for money. No direct evidence was given that the appellant knew of the gaming. The appellant stated that the house was closed at 11 p.m., that the three men were then in their private room, that she saw no cards, and did not supply any, and did not know of any card playing. The hall-porter, whose duty it was to attend upon customers, stated that he closed the house after 11 p.m., and retired to his own chair in a parlour beyond the bar, at the extreme end of the house. He knew nothing whatever of any gambling.

The justices drew the inference from the porter's evidence that his chair was removed to the greatest possible distance from the room where the guests were, in order that he might not hear what passed, and they thought that the appellant knew that gaming was intended to be carried on, and that she purposely took pains not to know what her guests were doing. On these grounds they convicted her:—

Held, first, that the appellant was responsible for the conduct of the hall-porter whom she left in charge of the hotel; secondly, that there was evidence that the porter suspected what was going on, and connived at it; and that this evidence justified the conviction.

CASE stated by justices of Surrey under 20 & 21 Vict. c. 43.

An information was preferred by H. Haynes (the respondent) against Elizabeth Redgate (the appellant) under the first subsection of s. 17 of the Intoxicating Liquors (Licensing) Act, 1872, charging that she, the appellant, on the 7th of January, 1875, at the parish of Epsom, Surrey, then and there being a licensed person and the occupier of certain licensed premises there, namely, the King's Head Hotel, did suffer gambling to be carried on in such premises; and upon the hearing the appellant was duly convicted of the offence, and adjudged to pay the sum of 5*l.* by way of penalty, and 1*l.* 3*s.* 6*d.* for costs.

The respondent Haynes is a sergeant of the Metropolitan Police force, stationed at Epsom. The appellant is the landlady of the King's Head Hotel, High Street, Epsom.

1876

REDGATE v. HAYNES.

The first subsection of s. 17 of the Intoxicating Liquors (Licensing) Act, 1872 (35 & 36 Vict. c. 94), enacts as follows:— "If any licensed person suffers any gaming to be carried on on his premises, he shall be liable to a penalty not exceeding for the first offence ten pounds."

On the hearing of the information, it was proved on the part of the respondent, by witnesses, that, whilst standing in the public street at the window of the room where the play took place, they could hear the conversation which took place, owing to the loud tone of voice in which it was conducted; that three persons, one of them, named James Nightingall, a horse trainer and inhabitant of Epsom, and another, named Henry Constable, a jockey, and also an inhabitant of Epsom, were, together with one Charles Groncock, gentleman, of Newmarket, but temporarily staying at the said King's Head Hotel, playing at cards for money, in a room in the house of the appellant, between the hours of half-past one and a quarter past two o'clock in the morning of the 7th of January, 1875; and it was subsequently admitted by Charles Groncock, who was called as a witness for the defence, that he, and James Nightingall, and Henry Constable were at such time and place playing at cards for money.

No direct evidence was given that the appellant knew of the gaming, and it was contended on her behalf, that she was in ignorance that play for money was going on in her house at the time stated, and therefore that she did not suffer gaming within the words of the Act.

The appellant gave evidence in her own defence, and also called the witnesses, whose names and depositions are hereafter stated.

Elizabeth Redgate, the appellant, deposed that she was defendant in the case. She had a guest of the name of Groncock, who had, on the 30th of December last, taken a sitting-room and two bed-rooms, and on the evening of the 6th of January had taken another bed-room. He had been a visitor in the house before. He was, on the evening of the 6th, an occupier of rooms in the house. The house was closed at 11 on the 6th. She went into the room on the right-hand side of the hall a little before 11, to ask if any refreshments were required before closing.

Mr. Nightingall and Mr. Groncock were then in conversation, and they did not require anything. She afterwards closed the house, and did not go into the room again. She saw no cards, and did not supply any. She had no cards in the house, and had never seen any, and did not know of any card playing. As she came away she told the hall porter she was going to bed. She then locked up the bar, and went to bed. Mr. Groncock had engaged two bed-rooms and then a third, for that night; and all three gentlemen stayed in the house that night. Mr. Groncock had the exclusive use of the room for the seven days mentioned, and he was still there. One night Mr. Nightingall was there. The said two bed-rooms were occupied by Mr. Groncock and Mr. Constable, and the third by Mr. Nightingall.

John Matthews deposed, that he was hall porter at the King's Head. It was his duty to close the house, and attend on customers. Betting and gaming were specially prohibited in the house, and notices similar to that produced,—which was in the following words: "Subscribers and visitors are respectfully informed that betting cannot be permitted,"—were hung round the billiard room. On the night of the 6th of January Mr. Groncock had the occupation of the room on the right-hand side with Mr. Constable. He had the exclusive use of it. A little before eleven on the evening of the 6th he saw Miss Redgate go to this room, and when she came away she said she was going to bed. She then closed the bar and went to bed. He (John Matthews) closed the house, and retired to his own chair in a parlour beyond the bar at the extreme end of the house. He attended to the door and saw the police come in. He knew nothing whatever of any gambling, and did not go into the room after eleven till Mr. Groncock went to bed, when he turned the light out.

Charles Groncock deposed that he resided at Foley House, Newmarket, and was of independent means. On the 6th of January he was residing at the King's Head. He came there on the 31st of December, 1874, and took a sitting-room and two bed-rooms, and Mr. Constable was with him the whole time. He (Mr. Groncock) had one and Mr. Constable the other bed-room. On the evening of the 6th Mr. Nightingall was with him (Mr.

1876

REDGATE v. HAYNES.

Groncock). Just before eleven o'clock Miss Redgate came into his room to know if he wanted anything more. He asked his guests, and they said "No." They were then in conversation. She said she was going to bed. After that they began to play at cards, but Miss Redgate knew nothing whatever of it, and they played till the police came in. There was no concealing the cards. They played for money.

On the above evidence the justices were of opinion that the appellant knew that gaming was intended to be carried on in her house, and that she instructed the hall porter, who waited up, to go to the parlour beyond the bar at the extreme end of the house, where it was impossible that he could hear the loud talking that took place, instead of being in his usual position in the hall, where he could have heard everything; and that, in fact, the appellant purposely took pains not to know what her guests (two of whom were residents in Epsom) were doing; and, therefore, it was by her own wilful neglect of proper precautionary measures and supervision on her premises, and through her own default, that the gaming took place. The justices were also of opinion that, as the word "knowingly" was inserted in the form of licence given in the schedule, and directed to be used by the Act 9 Geo. 4, c. 61, and which Act was in force up to the year 1872, the legislature by leaving out the word "knowingly" in the Act of 1872, intended to cast upon the licensed persons the onus of taking active measures to prevent gaming in their premises; and that it was not necessary to have stronger and more direct evidence than they had in support of the information, and they thought this view was supported by the fact that in the section immediately preceding the one in question, viz. the 16th section, it is enacted that: "If any licensed person knowingly harbours or knowingly suffers to remain on his premises any constable, &c."

Their decision, therefore, was that the defendant be convicted of the offence with which she was charged, and that she pay a penalty of 5*l.* and the costs.

The question for the opinion of the Court is whether proof of actual and direct knowledge on the part of the appellant or her servants that play for money was going on in her premises at the time hereinbefore stated was necessary to support the conviction

under subs. 1 of s. 17 of the Intoxicating Liquors (Licensing) Act, 1872.

If the Court should be of opinion that the conviction was legally and properly made, then the conviction is to stand, but if the Court should be of opinion otherwise, then the information is to be dismissed.

Pursuant to an order of the Court, dated the 12th of June, 1875, the case was amended by adding the following statement:—

There was not any "direct" evidence that the hall porter was sent to an unusual place. His own evidence was that he retired to his own chair in a parlour beyond the bar "at the extreme end of the house." As the usual place for the hall porter's chair is in the hall, and he stated that part of his duty was to wait upon the guests in the sitting-room, the justices drew the inference that the removal of the chair to the greatest possible distance from that room was in order that he might not hear what passed there, and that such removal was directed by the appellant.

Willis, for the appellant. The conviction was wrong. The penalty imposed by 35 & 36 Vict. c. 94, s. 17, can only be imposed where there is evidence that the gaming was carried on with the consent or connivance of the person convicted. This is shewn by the recent case of *Bosley* v. *Davies*. (1) Here there was no such evidence. There was nothing to warrant the conclusion of the justices that the porter was sent away from his usual place in the hotel.

[BLACKBURN, J. When the porter takes his place in a remote chamber, is not that evidence that he was directed to go there?]

The justices say generally that the usual place for the hall porter's chair is in the hall; but there was no evidence in the particular case that the porter had actually removed his chair, or was not sitting in his customary place.

[LUSH, J. Had not the appellant reason to suppose from the description of the guests, that they were likely to play cards if they spent the evening together?]

She took every precaution in her power to stop card-playing.

Sir J. Holker, A.G. (*C. Bowen* with him), for the respondent. The conviction was right. There was sufficient evidence of con-

(1) Ante, p. 84.

1876

REDGATE v. HAYNES.

nivance at or constructive knowledge of the card playing. The appellant ought to have suspected from the character of her guests that they were precisely the sort of people who, if they stopped up late, would play cards. She goes away, leaving a porter in charge of the house, and is clearly liable for any neglect of duty on the part of the porter. Now there is not the slightest evidence that the porter either warned the guests or took any precaution to prevent gaming. They appear to have talked so loud that if he had remained near the door he must have heard them, and by opening the door he could at once have discovered what was going on.

[BLACKBURN, J. I cannot see that it is necessarily the duty of the porter to listen at the keyhole, or to intrude upon the guests.]

But the porter appears to have gone off to the furthest part of the hotel that he might avoid hearing anything. Under s. 17 the appellant is liable if gaming is carried on in her house without interruption, whether she or her servants had knowledge of it or not. The word "knowingly" was advisedly omitted from the section.

BLACKBURN, J. I think that in this case there was evidence upon which the justices might draw the conclusion that the appellant suffered gaming to be carried on on her premises. Sect. 17 of the Intoxicating Liquors (Licensing) Act, 1872, enacts that, if any licensed person suffers any gaming to be carried on on his premises, he shall be liable to a penalty. Gaming did, in fact, take place in the appellant's house, and the question is, whether she can be said to have "suffered" it. I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not "suffering" the gaming to be carried on, and if the justices were of a different opinion they were wrong; but I think, if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house, and if those persons connive at the gaming, she is responsible. Now the facts in this case are that three men, one a

horse trainer, another a jockey, and a third an inhabitant of Newmarket, who had probably also something to do with horses, were, late in the evening, in a private room together. Now I am far from saying that, as a matter of law, it is to be inferred that when people connected with horses spend the evening together they will play cards for money, but their particular occupation renders it not improbable. Further than this I do not go. The landlady says that a little before eleven she went into the room to ask if any refreshments were required before closing; that they answered that they did not require anything; and that she then went to bed, leaving the hall porter in charge of the house. It appears that this porter at once proceeded to a room at the extreme end of the house, and, as far as we can see, it was the furthest and most remote from the room where the guests were sitting up. It is perfectly clear that if he had remained near the latter room he would have heard what was going on. He did not hear because he was in the remotest room, and the justices have drawn the conclusion that he was ordered to keep out of the way, and that he practically connived at the gaming. Nearly the whole of the evidence from which they drew this conclusion is stated clearly enough, the only ambiguity is as to the removal of the porter's chair. If the justices state that, from their knowledge, the chair was removed on this particular evening, I think that, though it would not necessarily lead to the conclusion that the porter purposely kept out of the way, it would be the strongest evidence of it. If it only means that in most instances, and so far as the justices know, the porter's chair is placed in the hall, then, though I do not think the conduct of the porter is the strongest evidence, it is some evidence to the same effect. I do not agree that it is the duty of the porter to look into the room from time to time, or to listen close to the door; but, as it is clear that if he had remained in the hall he would have heard what was going on, and as he did not remain, but went away to the parlour at the extreme end of the house, might not the justices draw the conclusion that he "suffered" what was going on, and that he went away that he might not hear? I cannot say whether or not I should have drawn the same conclusion myself. But it is only necessary for us to say whether there was some evidence to enable

1876

REDGATE v. HAYNES.

the justices to convict. I think there was some evidence; and the justices, from their local knowledge, were probably better able to deal with it than we are.

LUSH, J. I am of the same opinion. I agree that it is not necessary that actual knowledge of the gaming should be proved. Sect. 17 says that the owner of licensed premises who "suffers" gaming shall be liable to a penalty, and I think that connivance on the part of the landlady or the person in charge would be quite sufficient. The only question here is whether there was any evidence of such connivance, and I think there was. It is enough to say that the justices were warranted in the conclusion at which they arrived. What conclusion I might have drawn myself is not the question.

Judgment for the respondent. (1)

Solicitor for appellant: *Ambrose Haynes.*
Solicitor for respondent: *Solicitor to the Treasury.*

1875
Dec. 21.

[IN THE EXCHEQUER CHAMBER.]

DUDGEON AND OTHERS *v.* PEMBROKE.

Marine Insurance—Time Policy—Warranty or Condition of Seaworthiness—Effect of Unseaworthiness.

In an action on a time policy on ship, the defendant pleaded, 3rdly, that the ship was not lost by the perils insured against; 6thly, that after the making of the policy the plaintiff, knowing she was unseaworthy, wrongfully sent the ship to sea in such unseaworthy condition, and the loss was occasioned by the unseaworthiness and not otherwise.

At the trial it was proved that in January, 1872, the plaintiff, the owner of a steamship, effected an insurance on it with the defendant for twelve months; the policy, though for twelve months, was on a voyage policy form; the perils insured against were, inter alia, of the seas. At the time the policy was effected the ship was on the plaintiff's own premises in London undergoing repairs. She sailed on the 3rd of February for Gothenburg, and arrived there on the 7th of February; she leaked on her voyage more than could be accounted for by the weather she met with. She sailed for London on the 11th of February and met with bad weather; she leaked very much, became waterlogged, and did not readily answer to her helm; owing to this and to the thickness of the weather, she was stranded on the English coast on the 15th of February, and became a total loss.

(1) See the preceding case.

In answer to questions by the judge the jury could not agree whether the ship was unseaworthy when she sailed from London; but they found that, if she were, the plaintiff did not know of it; and they could not agree whether the unseaworthiness was the cause of the loss.

On these findings, the verdict having been entered for the plaintiff, a rule was obtained for a new trial on the ground that the findings did not warrant a verdict for the plaintiff:—

Held, in the Court of Queen's Bench, by Blackburn and Quain, JJ., that the rule ought to be discharged, on the ground that, assuming the ship to have been unseaworthy when she sailed from London, and that she was lost by perils insured against owing to the unseaworthiness, yet as the plaintiff did not know of the unseaworthiness he was entitled to recover.

Held, in the Exchequer Chamber,

By Cleasby and Pollock, BB., that, on the same assumptions, the rule ought to be absolute for a new trial, on the ground that, where the ship, as in this case, is in the hands of the owners, and is intended for a voyage, and a time policy is made, the assured is under an obligation to have the vessel seaworthy at the commencement of the voyage; and if she be not seaworthy he cannot recover.

By Brett, J., and Amphlett, B., that there is no warranty or condition of seaworthiness in any time policy; and as the causa proxima of the loss was a sea peril, the verdict was right on the 3rd issue; and as the plaintiff did not know of the unseaworthiness the verdict ought to stand on the 6th issue also.

By Lord Coleridge, C.J., and Grove, J., that, assuming there is no warranty of seaworthiness in a time policy, the rule ought to be absolute, in order that a jury might ascertain which was the efficient predominating cause of the loss, perils of the seas or unseaworthiness, which was the issue raised by the 3rd and 6th pleas.

Held, also, by Lord Coleridge, C.J., that there is a warranty of seaworthiness in such a time policy as the present.

Affd by H of L 2 App Cas 288

APPEAL by the defendant to the Exchequer Chamber from the decision of the Court of Queen's Bench, discharging a rule to set aside the verdict entered for the plaintiffs, and to enter the verdict for the defendant, or for a new trial. (1)

1. The action was for a total loss on a time policy.

2. The declaration was upon a time policy of insurance, dated the 31st of January, 1872, effected by the plaintiffs and underwritten by the defendant. The declaration set out the policy verbatim, of which the following are the parts noticed by the Court: The insured "caused themselves to be insured lost or not lost, at and from for and during the space of twelve calendar months commencing on the 24th day of January, 1872, and ending on the 23rd day of January, 1873, both days inclusive, in port and

(1) Law Rep. 9 Q. B. 581.

1875

DUDGEON v. PEMBROKE.

at sea, in dock and on way, at all times in all places, and on all occasions and services, with leave to tow and be towed, and to assist vessels in all situations including all risks incidental to steam navigation, upon any kind of goods and merchandises, and also upon the body tackle, apparel, ordnance, munition, artillery, boats, and other furniture of and in the good ship or vessel the *Frances* (S.), whereof is master, under God, for this present voyage , or whosoever else shall go for master in the said ship . . . beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., including all risks and conditions of the collision clause as attached, forming part of the policy, and shall so continue and endure during her abode there upon the said ship, &c. And further, until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at as above, upon the said ship, &c., until she hath been moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be then discharged and safely landed. . . .

"The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 5800*l*.

"On ship valued at	8,000*l*.
"Machinery	4,000*l*.
	12,000*l*.

"Touching the adventures and perils which we, the assured are contented to bear and do take upon us in this voyage, they are of the seas, men of war, fire . . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof." . . . .

The declaration then alleged interest in the plaintiffs, or one of them, and that the ship with the machinery, during the twelve months from the 24th of January, 1872, to the 23rd of January, 1873, and during the continuance of the risk by the policy insured, by perils insured against was wholly lost.

3. The pleas material to the appeal, were—

(3.) That the ship with the machinery, was not, by the perils insured against, or any of them, lost as alleged.

(4.) That defendant was induced to underwrite the policy by misrepresentations of the plaintiffs and their agents.

(5.) Concealment by plaintiffs of material facts.

(6.) That after the making of the policy, the plaintiffs, well knowing that the ship was wholly unseaworthy, wrongfully and improperly, and without any justifiable cause or reason, caused her to proceed from the port of London in such wholly unseaworthy condition on the voyage in which she was afterwards lost; and that she remained in the same unseaworthy condition, and was lost by reason of such unseaworthiness, and not otherwise.

Issue joined.

4. The cause was tried at the London sittings after Trinity Term, 1873, before Blackburn, J., and the following facts were given in evidence, or admitted on both sides.

5. The plaintiffs are iron ship builders and marine engineers, carrying on business at Millwall, and are proprietors of a line of steamers trading between London and Gothenburg, and the defendant is an underwriter at Lloyd's.

6. The *Frances* was an iron screw steamer of 705 tons register, built at Amsterdam in the year 1858, and launched in 1859, for Spanish owners, under the name of the *Paris*. Evidence was given at the trial on behalf of the plaintiffs that she had originally been constructed of good iron.

7. The defendants gave evidence that in or about the year 1868, the vessel was lying at anchor in the harbour in Cadiz, and continued there unemployed for about eighteen months. She was then the property of Messrs. A. Lopes & Co., shipowners, of Cadiz and Barcelona.

8. In the month of September, 1871, the *Paris* was at Birkenhead, and was offered for sale there. Two persons who inspected the *Paris* while at Birkenhead in September, 1871, were called by the defendant at the trial; neither made a regular survey of the vessel, but both came to the conclusion that she was very dirty, and had been much neglected, and that her iron was probably corroded, and they did not purchase her.

9. In the said month of September, 1871, the plaintiffs con-

1875

DUDGEON v. PEMBROKE.

tracted with the Spanish owners of the *Paris* to build them a new ship, and to take the *Paris*, which was then at Birkenhead, in part payment, at about 4000*l*. She was then brought round to Millwall from Birkenhead, with the original boilers on board, which were not fit for use, and she was consequently towed round. During the passage she made water, and her pumps were constantly attended to.

10. After the arrival of the *Paris* at Millwall, the plaintiffs caused the boilers to be taken out of the ship, and she was offered for sale to the agent of a firm at Hull, who, after examining her afloat, but not making a regular survey, advised his principals not to buy her, because, in his judgment, as he stated at the trial, the sides and frames in the bunker and boiler space were in a bad condition from corrosion, and the screw tunnel was in a defective state.

11. At the time the plaintiffs became owners of the *Paris* they were the owners of two steamers, named respectively the *Mary* and the *Louisa Ann Fanny*, running for the conveyance of cargo and passengers between London and Gothenburg. One of them, the *Louisa Ann Fanny*, met with a collision; and the plaintiffs resolved to repair the *Paris*, and run her on the line, and change her name to the *Frances*. It was stated by one of the plaintiffs that the vessel's name was changed to the *Frances* in compliment to the daughter of one of his partners, their ships on that line being always called by female names connected with the firm's family.

12. For this purpose the vessel was placed in a dry dock at Millwall, and scraped perfectly clean; and the plaintiffs deposed that they believed the ship to be quite capable of being made fit for the service, and that orders were given to Mr. Harrington, the marine surveyor and engineer, to superintend the repairing of the vessel, and to see that she was properly repaired, and that the plaintiffs' workmen at Millwall were told to execute whatever repairs were required; and that there was no stint whatever as to the amount of the repairs; and that they fully believed that the ship was made seaworthy. Mr. Harrington, who was called on their behalf, confirmed this, and gave positive testimony that everything was done that was required, and, in his opinion, she

was made a thoroughly good strong ship. The old boilers were taken out, the boiler space was all open to view; but the ceiling was only partly removed, and the cement was not removed at all, so that the whole of the inside was not visible. There was contradictory evidence among the skilled witnesses as to whether the removal of the ceiling and the cement was necessary or not. Mr. Harrington deposed that it was not at all required. Strong evidence was given on the part of the plaintiffs by shipwrights and dock people that everything was done that was requisite.

13. On the defendant's behalf witnesses were called to prove that, in their opinion, sufficient repairs had not been done, and that, in their opinion, the ship was not seaworthy by reason of corroded iron having been left in the ship, and sufficient new plates not having been put in. A witness called by the plaintiffs, on cross-examination, stated that the screw tunnel was in a defective condition. Similar evidence as to this was given on behalf of the defendant; and it was proved that no repairs were done to the screw tunnel.

14. After the repairs had been executed, and before the *Frances* left London, a surveyor to the Board of Trade surveyed the outside of the ship, but by reason of a want of time the inside was not surveyed; and consequently the ship did not obtain a passengers' certificate, and ultimately sailed for Gothenburg on the 3rd of February, 1872, without one.

15. On or about the 31st of January, 1872, the plaintiffs caused the policy now sued on to be effected for twelve calendar months from the 24th of January, 1872, to the 23rd of January, 1873; and the policy was subscribed by the defendant for 100*l.*

16. At the time of effecting the policy it was stated to the representative of the defendant (who then knew nothing of or about the vessel) by the clerk to the brokers on behalf of the assured, that the *Frances* was a vessel the plaintiffs had taken in exchange; that she had been thoroughly repaired or partially rebuilt; and that they were going to put her into the Gothenburg trade, similar to the *Louisa Ann Fanny* and *Mary*.

17. On the morning of Saturday, the 3rd of February, 1872, the *Frances* sailed from London for Gothenburg, with some machinery on deck, but no other cargo, so that she was somewhat crank.

1875

DUDGEON v. PEMBROKE.

18. Towards noon on Sunday, the day after the vessel left London, some water was observed in the stokehole and engine-room, and the quantity of water she made, whatever it was, was more than would be accounted for by any weather the ship met with. The ship arrived safely at Gothenburg on the 7th of February.

19. On her arrival in smooth water at Gothenburg the *Frances* ceased to leak. She was examined there by two carpenters, but the cause of her making water was not discovered.

20. On the 11th of February, at seven a.m., the *Frances*, having taken on board a cargo consisting of oats and about 180 tons of iron, together with a deck cargo of deals, left Gothenburg for London.

21. On the morning of the 12th of February, when the *Frances* reached the open sea, the wind began to blow, and a heavy rolling sea was running, and it became necessary to put a sail over the stokehole to prevent the sea from getting in. It was stated by the plaintiffs' witnesses that it blew a gale, but the weather was not such as to make a good ship behave as the *Frances* did.

22. The *Frances* laboured heavily, and began to make water to such an extent that in sixteen hours the fires were extinguished. A portion of the deals which formed the deck cargo was used for relighting the fires, and the rest were thrown or washed overboard. After about twelve hours pumping, the pumps got choked with the oats, and all hands had to be employed in baling the ship. There was evidence given by the defendant that had the screw tunnel been in proper order, the pumps would not have got choked as they did.

23. On the night of the 14th of February those on board the *Frances*, having sighted the Spurn Lights, endeavoured to get her into Hull; the ship, at the time being waterlogged, did not readily answer her helm. Partly from this, and partly from the thickness of the weather, which at the time was very dense, on the following morning, at about five a.m., the ship, having been in a state of distress since the morning of the 12th of February, went ashore under Didlington Heights, upon the coast of Yorkshire. One of the boats was swamped, but the crew were all saved by a smack. Part of the cargo was afterwards saved, but the vessel could not

be got off, and subsequently broke in two, and, finally, after some months, went completely to pieces.

24. At the time of effecting the insurance the vessel was unclassed.

25. At the conclusion of the evidence the learned judge, having reduced into writing the questions he proposed asking the jury, read them to the counsel on each side. Neither side suggested that any further question should be put to the jury.

26. Counsel on each side having addressed the jury, the learned judge thereupon summed up, and left the seven following questions to them, which, together with the answers of the jury, were as follows:—

(1.) Was the representation made by the broker at the time of making the insurance as to the condition of the vessel and as to the extent of examination substantially correct?—Yes.

(2.) Did that representation involve in it a statement that the vessel was to convey passengers, and consequently had been surveyed by the Board of Trade?—No.

(3.) Was there a concealment from the underwriters of anything materially affecting the insurance which the plaintiffs knew and which the underwriters did not?—No.

(4.) Was the fact that the ship had not been surveyed and certified for passengers one which, under the circumstances, was material?—No.

(5.) Was the vessel seaworthy when she started?—The jury cannot agree.

(6.) If not, was that known to the plaintiffs?—No.

(7.) Was that unseaworthiness the cause of the loss?—The jury cannot agree.

27. Upon these findings the learned judge directed a verdict to be entered for the plaintiffs; and in Michaelmas Term, 1873, the defendants obtained a rule to set aside the verdict; as regards the verdict on the 6th plea, on the ground that the findings of the jury did not warrant the entry of the verdict; and as regards the verdict on the 3rd plea, on the ground that there was no finding to warrant the entry of such verdict; and to enter the verdict for the defendant; or for a new trial on the ground that the findings of the jury on the questions submitted to them were

1875

DUDGEON v. PEMBROKE.

against the weight of evidence, and that the findings are inconsistent and incomplete, and insufficient to warrant the entry of the verdict.

discharged This rule was ~~made absolute~~ on the 6th of July, 1874, after time taken to consider. (1)

June 16, 17. *Butt, Q.C.* (*Cohen, Q.C.*, with him), for the defendant. The defendant is content to have a new trial, and abandons that part of the rule which relates to entering a verdict. Three points present themselves for discussion. First, as to the finding of the jury on the fourth issue. The jury were discharged without answering the fifth question, and therefore the defendant has a right to argue as if that fact had been found in his favour. But the unseaworthiness of the ship is inconsistent with the representation found by the jury to be substantially correct, that the ship had been thoroughly repaired. The effect of what has taken place is that it must be assumed both that the ship was thoroughly repaired, and yet that she was unseaworthy; these two conclusions cannot both stand, and there ought to be a new trial to determine which is correct.

Secondly, the judge was wrong in entering a verdict for the plaintiffs on the sixth issue. A contract of marine insurance is a contract of indemnity, and even assuming that there is no warranty in a time policy that a ship is seaworthy, yet if the assured sends a ship to sea in an unseaworthy state and she is thereby lost, he is damnified by his own wrong, and cannot recover on the policy. The jury have found that the plaintiffs did not know that the ship was unseaworthy when she started on her voyage; but knowledge is immaterial if in fact she was unseaworthy. By s. 11 of 34 & 35 Vict. c. 110, a person sending a ship to sea in an unseaworthy state may be found guilty of a misdemeanour, and it lies on him to prove that he was ignorant that the ship was not seaworthy. No doubt, *Thompson* v. *Hopper* (2) may appear to be an authority in favour of the plaintiffs; but this decision is erroneous; it may be overruled in this Court. In *Gibson* v. *Small* (3) it was held that there was in general no warranty of seaworthiness in a

2 Jur. N.S. 669 3 L.T. 133 5 W.R.

(1) Law Rep. 9 Q. B. 581. (2) 6 E. & B. 172; 25 L. J. (Q.B.) 240.

(3) 4 H. L. C. 353. 17 Jur. 1131.

1875

DUDGEON v. PEMBROKE.

time policy, but it was thrown out by Lord St. Leonards that on a time policy on a ship about to sail from a home port, that is, a port where the owner resides, there is an implied warranty of seaworthiness. *Fawcus* v. *Sarsfield* (1) is in favour of the defendant's contention; there was no averment of knowledge in the plea in that case, and the loss arose from wear and tear; that is not so here, the loss in this case is from the inherent vice of the thing insured. The ship was sent to sea in a bad and defective condition, and she was not fit to encounter the ordinary force of the winds and waves on the voyage she was prosecuting at that time of the year; and if she was sent to sea in such condition and lost owing to that condition, whether the plaintiffs had knowledge of her state or not, they cannot recover.

Thirdly, there is no finding by the jury of a loss by perils insured against. The judge ought not to have decided this question, and ought not to have entered the verdict for the plaintiffs on the third issue. The vessel was lost not by the perils insured against, but by her own inherent vice. Where an underwriter undertakes an insurance he does not insure against the inherent vice of the thing insured. For instance, he would not be liable for an insurance on a cargo of fruit put on board in a defective state, and which arrived at its destination deteriorated; so on an insurance on hides shipped in bad condition and which on becoming putrid were thrown overboard, the loss being occasioned by the inherent vice of the thing insured, the loss would not fall upon the underwriter. The efficient or moving cause of the loss was the unseaworthiness of the vessel. Phillips on Insurance, § 1132, lays down the result of the cases thus: "In case of the concurrence of different perils, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In Maude and Pollock on Shipping, 3rd ed. 364, it is said: "The mere remoteness, however, of the cause, if there be no other independent cause intervening, will not prevent its being considered as the cause to which the loss is to be attributed. Thus, where a vessel laden with hides and tobacco shipped water, which rendered the hides putrid, and the gas which escaped from them injured the tobacco, it

(1) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

1875

DUDGEON v. PEMBROKE.

was held that the damage was one which resulted, although not immediately, from the perils of the sea: *Montoya* v. *London Assurance Co.* (1); *Ionides* v. *Universal Marine Insurance Co.*" (2) In *Bell* v. *Carstairs* (3) the act of the captain of the vessel was the immediate cause of the loss, but the efficient or moving cause was held to be the want of proper documents. So in *Bondrett* v. *Hentigg* (4) the perils of the sea were held to be the cause of the loss, but the immediate cause of the loss was the destruction of the goods by the natives after they had been landed. In the present case it is the inherent infirmity of the ship that occasioned the loss. The vessel started on her voyage in an unseaworthy state, and meeting with merely rough weather became waterlogged because she was unseaworthy, her loss therefore was occasioned by her inherent vice, and cannot be attributed to the perils of the sea.

June 18. *Watkin Williams, Q.C.* (*A. L. Smith* with him), for the plaintiffs. The verdict was rightly entered for the plaintiffs on the fourth issue. [He was stopped by the Court on this point.]

[The arguments for the plaintiffs on the second and third points are fully given in the judgment of Brett, J. (5) In addition to the cases noticed in the judgments, he cited *Davidson* v. *Burnand* (6) and *Biccard* v. *Shepherd.* (7)]

Butt, Q.C., in reply.

Cur. adv. vult.

Dec. 21. The judgment of Cleasby and Pollock, BB., was delivered by

CLEASBY, B. It does not appear to be necessary in this case to consider the general question of there being an implied warranty of seaworthiness in such a case as the present, because such a warranty is in general a condition precedent, and the breach of it avoids the policy altogether; but in the present case the policy attached on the 23rd of January, when the vessel was in dock, having just undergone some repairs, or still undergoing them; and

(1) 6 Ex. 451; 20 L. J. (Ex.) 254.
(2) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(3) 14 East, 374.
(4) Holt, N. P. 149.
(5) See post, p. 115.
(6) Law Rep. 4 C. P. 117.
(7) 14 Moo. P. C. 471.

1875

DUDGEON v. PEMBROKE.

Cleasby, B.

there was no breach of any warranty or condition then, and what took place afterwards would not entirely avoid the policy.

We have to deal in the present case with matter subsequent to the commencement of the risk, and to consider not so much the validity of the policy as the right to recover upon it under the circumstances stated in the case. It is of little consequence whether the matter subsequent is regarded as avoiding the policy from the time of its occurrence, or as disentitling the plaintiffs to recover under the policy; but it seems more correct to consider it as affecting the right to recover and not the policy itself, because, notwithstanding the matter subsequent, the assured might no doubt recover upon the policy in respect of a partial loss or damage which had occurred before, as by fire or otherwise.

The real question in the present case is whether,—upon a time policy, where the risk attaches while the ship is in the hands of the assured, and the vessel afterwards starts upon a voyage in an unseaworthy condition, and is lost in consequence of such unseaworthiness,—the assured can recover.

In considering the propriety of entering a verdict for the plaintiffs upon the imperfect finding of the issues, the case was properly argued on both sides as if the jury had found the 6th issue, except the averment of the plaintiffs' knowledge of the unseaworthiness, in favour of the defendant; and it does not appear to me necessary, so far as regards the 6th plea, to enter into the question of the causa proxima of the loss, and whether it was eventually caused by fog or sea perils, because the meaning of the 6th plea is clearly, not that the vessel did not go down from sea perils, but that this was the consequence of the unseaworthiness of the ship which caused her to get into difficulty and become unmanageable, which would not otherwise have occurred.

Upon the question so raised there is no authority in this country which can be considered as clear and decisive.

If in the present case the vessel had gone down in a storm along with the other vessels in the North Sea, it may be that, after the cases of *Gibson* v. *Small* (1), *Thompson* v. *Hopper* (2), and *Michael* v. *Tredwin* (3), it would have been difficult to maintain

(1) 4 H. L. C. 353. 17 Jur. 1134 (Q.B.) 240; 26 L. J. (Q.B.) 18.
(2) 6 E. & B. 172, 937; 25 L. J. (3) 17 C. B. 551; 25 L. J. (C.P.) 83.

(2 EC 2 Jur. N.S. 609; 3 L. 133. 5 Legge[2]

1875

DUDGEON v. PEMBROKE.

Cleasby, B.

that by reason of the vessel being unseaworthy at the commencement of the voyage the defendant would be entitled to succeed. I by no means say that this is the clear effect of those decisions. The decision in *Thompson* v. *Hopper* (1), in the Exchequer Chamber, proceeded only upon the proper meaning of the language of the plea, and it only shews that, if a plea alleges unseaworthiness, and then that by reason thereof the vessel was lost, the meaning is that the unseaworthiness was the immediate and proximate cause of the loss, and that such a plea would not be proved by shewing that the proximate cause of the loss was the sea peril and danger of navigation, though the vessel was exposed to them by the shipowner in an unseaworthy state. The decision in the Queen's Bench had been the other way.

The particular question, which I have considered as raised in the present case, was brought before the Court of Queen's Bench, and adverted to in the case of *Hollingworth* v. *Brodrick*. (2) The question was not properly raised, and could not be decided, but most of the judges advert to the absence of the loss being the consequence of the unseaworthiness as preventing the unseaworthiness from being an answer. And as the matter is thus left undecided it is useless to refer to the cases more particularly.

It cannot be questioned, I think, and was not questioned on the argument, that the 6th plea is an answer to the action, but the 6th plea avers, in addition to the other facts raising the defence, that when the vessel was sent to sea the plaintiffs knew that she was in an unseaworthy state, and this averment is negatived by the jury. The judgments in *Thompson* v. *Hopper* (3), both in the Queen's Bench and Exchequer Chamber, shew that with this averment the defence would be complete: see particularly the judgment of Cockburn, C.J., in the Exchequer Chamber and of Lord Campbell in the Queen's Bench. Now if the answer would have been sufficient without the averment, the averment need not be proved; and therefore we have to consider the effect in such a policy as this of the assured sending the vessel to sea in a condition which makes her unseaworthy for the voyage on which she

(1) E. B. & E. 1038; 27 L. J. (Q.B.) 441.

(2) 7 A. & E. 40.

(3) 6 E. & B. 937, 944; 26 L. J. (Q.B.) 18; E. B. & E. 1038, 1054; 27 L. J. (Q.B.) 441, 447.

is sent, though not so to the knowledge of the assured, and particularly when such unseaworthiness causes her loss. In the absence of any decision upon the matter in our Courts the case must be considered upon principle. Now we are considering a contract of a peculiar nature. The contract of insurance is (in the language of Mr. Arnould, p. 1 of his work), "in its essential nature and in all its incidents a contract of indemnity," that is, a contract of indemnity from certain losses. And it follows that on such a contract a man cannot recover for losses which are the consequence of his own default. And it can make no difference that the proximate cause of loss was a particular event, if that particular event was in the ordinary course of things brought about by that default. There is no question that knowingly sending a vessel to sea in an unseaworthy state is such a default; but would it not be equally a default, if a vessel had been many voyages and had been then lying in dock for some time, to send her to sea without having been surveyed and examined, if the consequence is that she is lost, when if she had been surveyed and repaired she would not have been lost? And are not in such a case the means and opportunities of knowledge equivalent to actual knowledge?

The question in the present case, as the pleadings stand, no doubt, is whether the fact of unseaworthiness at the beginning of the voyage which causes the loss is itself an answer. The importance of the rule that the assured shall have his vessel in good repair at the commencement of the voyage—which, though technically the commencement of the risk in voyage policies only, is substantially and mainly the commencement of the risk in all cases where it is the first voyage undertaken—is laid down in the strongest terms by the most eminent judges: see Lord Eldon in *Douglas* v. *Scougall.* (1) His language is: "I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured; and I have endeavoured, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of a sound discretion, I have been enabled to do so." He is speaking in that particular case of a voyage policy, but the

(1) 4 Dow, at p. 276.

1875

DUDGEON v. PEMBROKE.

Cleasby, B.

ground is equally applicable to a voyage undertaken under the protection of a time policy. Lord Redesdale, in *Wilkie* v. *Geddes* (1), uses the following language, the reasoning of which is equally applicable to voyages undertaken under time policies and under voyage policies: "Unless the assured were bound to take care that the vessel was in every respect seaworthy, the consequence would be most mischievous; for the effect of insurance would be to render those chiefly interested much more careless about the condition of the ship and the lives of those engaged in navigating her." And Lord St. Leonards in the case of *Gibson* v. *Small* (2), expressed an opinion that, under such circumstances as those of the present case, it was a condition that the ship was seaworthy at the commencement of the voyage.

Having regard to these opinions it appears to me most undesirable to relax the obligation, which such considerations have attached to the owner of a vessel, to have a vessel which he sends on a voyage seaworthy for that voyage. If he knows that he is under that obligation, and that by not complying with it he may lose the benefit of his insurance, he will take care to make the matter sure. But if it is to depend upon the uncertain conclusion of his knowledge, or of his doing his best, he may do as little as he can do to satisfy an apparent compliance, and take his chance in a matter involving such vital consequences.

The authorities and reasons are sufficient to satisfy me that, in this contract of indemnity, the unseaworthiness of the vessel at the commencement of the voyage, which unseaworthiness really causes the loss, is a fact, the consequences of which are imputable to the assured, and to be borne by him and not by the underwriters; and it follows that in the present case sufficient was proved to entitle the defendant to a verdict on the 6th plea, supposing the facts upon which the jury could not agree to have been found in favour of the defendant.

It is made an objection to this as a correct legal conclusion, however just it may appear to be, that it really introduces into a written contract a term not found in it which the parties might at any time have introduced into it, to the effect that there is an obligation or duty on the assured to have the vessel seaworthy for

(1) 3 Dow, at p. 60. (2) 4 H. L. C. at p. 417.

1875

DUDGEON v. PEMBROKE.

Cleasby, B.

the voyage for which she is destined. The answer is that the contract is an exceptional one, and the Courts have already departed from the ordinary rule by introducing into ordinary voyage policies a condition not found in it, and which the parties might insert or not, viz. that the vessel was seaworthy at the commencement of the risk, and have made it a condition avoiding the policy as much as if words to that effect had been inserted at the end. It may be considered that in such a contract of indemnity the real subject of insurance on a voyage policy is a vessel fit for the voyage, and that without this the foundation fails which is treated as a condition.

As a general rule upon time policies this condition is said to be inapplicable, because the vessel at the commencement of the risk may be in the middle of a voyage upon which it may have started in a seaworthy condition, but may have suffered so much as at the time to be quite unseaworthy. But it appears to be acting in the spirit of the decisions to hold that, if the vessel be in the possession of the owner destined for a voyage, there is some obligation on the assured to make the vessel fit for the voyage. And the breach of this obligation, though not a condition avoiding the policy altogether, as in the case of a voyage policy, is available as a defence where the loss arises from the improper condition of the vessel. Unless something is introduced into the policy not included in its terms, how could a defence be founded on the fact of the assured sending the vessel to sea knowing it to be unseaworthy, or having the means of knowledge, or sending it to sea without survey and examination when it is obvious such survey and examination ought to be had, and in consequence the vessel was lost? In those cases it would not be a part of the case that there had been any fraud on the part of the assured, but the defence must be founded on some obligation arising out of the subject of insurance and not contained in the policy. And the result would be that the assured could not recover in respect of a loss attributable to his neglect to have a ship made seaworthy on starting for the voyage.

It is not intended here to decide that, in the case of a time policy, there is an obligation to have the vessel seaworthy at the commencement of every voyage, wherever it may commence, undertaken during the currency of the policy. In the case of voyage

1875

DUDGEON v. PEMBROKE.

Cleasby, B.

policies there is no warranty of seaworthiness on starting from intermediate ports or upon the return voyage, but only at the commencement of the risk. What is decided here is, that where a vessel in the hands of the owner is intended for a voyage, and a time policy made, the assured is under an obligation to have the vessel seaworthy at the commencement of the voyage on which she starts, which is the commencement of the sea risks insured against. And it is considered better to deal with the circumstances of the particular case, such circumstances being of real importance in such a contract, rather than disregard the circumstances and act upon an inflexible rule of recent invention on account of its simplicity, as has been suggested.

The case of *Fawcus* v. *Sarsfield* (1) was much relied on in favour of this view. In that case the defence which is set up in this cause was complicated with other matters, which makes it not a satisfactory guide; but, if it cannot be treated as a decision in favour of the defendant, it affords an argument in his favour; for it certainly appears from that case that, if the vessel is in want of repairs and so unseaworthy, and a partial loss occurs, the underwriters are not liable to make good the damage resulting from the bad condition of the ship; and if not liable for a partial loss caused by unseaworthiness, why liable for a total loss resulting from the same cause? In either case the insured, and not the underwriter, should be responsible for the improper condition of the vessel when exposed to the perils.

In America the decisions seem to agree with this conclusion: see Phillips on Insurance, §§ 727, 731.

As regards the issue upon the 3rd plea, we were much pressed to hold that, as that issue was whether the ship was lost by the perils insured against, and the perils by which the vessel was lost resulted from the unseaworthiness of the ship, and those perils were not insured against, therefore that issue ought to be found for the defendant. In order to determine correctly how the issue ought to be entered, we must consider what is the meaning of the plea. Does it mean that the vessel was not lost by perils mentioned in the policy as perils insured against, or does it mean, as contended by the defendant, that the ship was not lost by perils

(1) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

for which the defendant, as a legal consequence, insured against, and for which he was responsible. Now the plea is a traverse of an allegation in the declaration, and when the plaintiffs allege that the vessel was lost by the perils insured against, I should say they really make an allegation of fact and not of legal liability; and as the sea perils were the immediate cause of loss I think that issue was correctly entered for the plaintiffs. The learned counsel for the plaintiffs when the case was before us was very decided in his opinion, and made it part of his argument, that if the plaintiffs had knowingly sent the vessel to sea in an unseaworthy state, the issue could properly be found for the defendant. Notwithstanding this admission, upon a correct view of the language of the issue, I think it is properly entered for the plaintiffs.

The statute 34 & 35 Vict. c. 110, has no direct bearing upon the present question, but so great is the obligation of a shipowner who sends a vessel to sea to send it in a seaworthy condition, that it is under ordinary circumstances, by s. 11, made a misdemeanour to send it in an unseaworthy condition so as to endanger life; and the owner has to shew, in order to escape from a criminal charge, that he used all reasonable means to make the vessel seaworthy, and was ignorant of the real condition of the vessel.

For the above reasons it appears to me that sufficient would have been proved and found to make the 6th plea an answer, if the questions on which the jury could not agree had been found for the defendant, and therefore that the issue upon that plea was improperly entered for the plaintiffs, and the judgment entered accordingly should be reversed and a new trial had.

This is the judgment of my Brother Pollock and myself.

The judgment of Brett, J., and Amphlett, B., was delivered by

BRETT, J. (1) The arguments in this case were almost exclusively confined to questions arising on the 3rd and 6th issues. Objection was taken, but not much, if at all, pressed to the judgment on the 4th issue. It seems sufficient to say that we never entertained any doubt that it was correct, and so stated during the argument. With respect to the 3rd and 6th issues, the material

(1) This judgment was read by Lord Coleridge, C.J.

1875

DUDGEON v. PEMBROKE.

Brett, J.

facts to be considered seem to me to be that the plaintiffs, being owners of the *Frances*, insured her whilst she was in the port of London and under their control, by a policy dated the 31st of January, 1872, for a year from the 24th of January, 1872, to the 23rd of January, 1873. The ship sailed from London for Gothenburg on the 3rd of February, 1872, and arrived on the 7th of February, 1872. She sailed again for London on the 11th of February, met with bad weather, leaked, became water-logged, and on the 14th of February, being unmanageable, was stranded on the coast of Yorkshire, and was a total loss.

Considering, as a whole, the written questions and the explanation of them to the jury and the ruling of the learned judge at the trial, as reported by him in his judgment in the Queen's Bench (1), I think it must be gathered that he directed the jury, as to the 3rd issue, that the evidence, being uncontradicted, was conclusive that the ship was lost by perils of the sea. And having regard to what the jury did and did not answer, we must meet the case as if the jury had found that the ship was in fact unseaworthy when she left London; that such unseaworthiness continued until she was lost; that such unseaworthiness was unknown to the assured; that it was a cause of the loss, in the sense that she became water-logged and unmanageable by reason of it and the weather, and went ashore in consequence; so that the loss would not have happened, notwithstanding the weather, but for the unseaworthiness. The question is, whether upon such facts and assumed finding the verdict was properly entered for the plaintiffs on the 3rd and 6th issue. If it ought not to have been so entered on both, there should be a new trial; if otherwise, the judgment below is right.

The case was elaborately argued. It was contended for the defendant, that the moving and efficient cause of the loss of the ship was her unseaworthiness, which existed when she first left port after the effecting of the policy and continued till she was lost; that consequently it could not properly be said that the ship was lost by a peril insured against. A loss occasioned by unseaworthiness, not arising after the attaching of the policy, must be treated, it was said, as a loss resulting from the inherent vice of the ship; and in either case the verdict ought to have been entered

(1) Law Rep. 9 Q. B. at p. 591.

1875

DUDGEON v. PEMBROKE.

Brett, J.

for the defendant on the 3rd issue. If the loss could be treated primâ facie as a loss by a peril insured against, yet a loss caused by such unseaworthiness as alleged must be treated as arising from a wrongful act of the assured; and a loss so arising cannot be covered by a contract of indemnity; and therefore the verdict ought to have been entered for the defendant on the 3rd and 6th issues, the averment of knowledge in the 6th plea being immaterial.

For the plaintiffs it was argued, that in a time policy there is no warranty of seaworthiness such as exists in a voyage policy namely, with the effect, that, if the ship is unseaworthy at the commencement of the risk, the contract of indemnity does not attach, and the premium must be returned; that, as you cannot imply any such warranty or condition as to seaworthiness at the commencement of the risk, so as to destroy the contract, you cannot introduce any such condition at all; there is no contract about seaworthiness at all, none expressed, none to be implied; that the subject-matter of a voyage policy is a ship seaworthy for the voyage at the commencement, but the subject-matter of a time policy is only a ship. If a loss is caused solely by unseaworthiness, existing before or at the time the policy attaches, it is, no doubt, a loss from the inherent vice of the ship and is not covered under either form of policy; but if it is a loss caused by a peril of the sea, although also caused by the unseaworthiness of the ship existing at the commencement and continuing, it is a loss proximately caused by a peril of the sea. In such a state of things, the assured, under a voyage policy, cannot recover, because the policy, by reason of the warranty and the existence, at the commencement, of unseaworthiness, never attaches; but, as there is no warranty in a time policy, there is no reason why the causa proxima should not solely be regarded. If the ship be intentionally cast away by direction of the assured, her loss is caused by a wrongful act of the assured, and so, if the ship be sent to sea to his knowledge unseaworthy and is lost in consequence. And it is an admitted principle, that for a loss efficiently caused by a wrongful act of the assured, he cannot recover compensation under a contract of indemnity. But the mere fact of the ship being unseaworthy when she goes to sea, if her condition be unknown to the assured, is not a wrongful act, and therefore the principle above enunciated

1875

DUDGEON v. PEMBROKE.

Brett, J.

does not apply. And, as there is no bargain that the ship shall be seaworthy at any period of the risk, a loss caused proximately by a peril of the sea is covered by a time policy, although the ship was unseaworthy at the attaching of the risk, and so continued till the time of loss, and would have surmounted the peril, if she had not been unseaworthy. It makes no difference whether the policy is effected whilst the ship is in port or at sea, at home or abroad. There cannot be a warranty implied from the same words depending upon the locality of the ship at the time those words are agreed upon.

The questions raised seem to be:—

1. Is there any such warranty of seaworthiness in any time policy as there is in every voyage policy in ordinary form, i. e. a warranty that the ship was or shall be seaworthy at the commencement of the risk?

2. Is there any warranty that the ship shall be seaworthy at any other time than at the commencement of the risk, as, for instance, at the commencement of any or every voyage sailed during the period insured?

3. Is there any condition, or stipulation by way of contract, that the underwriter shall not be liable for any loss which would not have happened, if the ship had not been unseaworthy at the commencement of the risk and so continued until the loss?

4. Was the uncontradicted evidence in this case conclusive that the ship was lost proximately by perils of the sea?

5. Did the facts, which are to be assumed, that she was unseaworthy when she left London, and so continued until she was lost, and that she would not have been lost if she had not been and continued so unseaworthy, absolve the defendant so as to entitle him to a verdict either on the third or the sixth plea?

As to the first question. In *Gibson* v. *Small* (1), in a time policy, the House of Lords decided that there is no such warranty, at all events, if the policy be made whilst the ship is at sea. In *Thompson* v. *Hopper* (2) it was decided by the Court of Queen's Bench that there is no such warranty, though the policy be made whilst the ship is in the port of the place of the owner's residence. The only question is whether this ruling in *Thompson* v. *Hopper* (2)

(1) 4 H. L. C. 353. (2) 6 E. & B. 172; 25 L. J. (Q.B.) 240.

can be and is to be overruled. If it is not, the two cases exhaust the point, and determine that there is no such warranty in any time policy in ordinary form as there is in every voyage policy in ordinary form. It seems impossible to add anything to the arguments which have been used on both sides as to this point. All that can be said seems to be contained, on one side, in the judgments of Erle, J., and on the other, in those of Lord Campbell and others. The reasoning of those who held that there is no such warranty in any time policy is, as I understand it, substantially as follows:—The warranty and its effect are admitted to exist in voyage policies, that is to say, in policies in which an insured voyage is or insured voyages are named. It is introduced by implication, either on the ground that it was originally proved to be by custom understood in such policies, and has therefore been adopted by the Courts as law; or on the ground that it has been introduced and adopted by the Courts alone, as a necessary implication from reason. It cannot be implied in time policies, that is to say, in policies in which no voyage is specified as a voyage insured, by the first process, because no such custom has ever been proved; it cannot be implied by the second process, because the reasoning which may have been used to introduce it into voyage policies cannot be applied to time policies. It is true that the warranty in different voyage policies, though enunciated by the same term "seaworthy," can be fulfilled by a different condition of the ship according to the different voyages named in the different policies; and so far, a different degree of condition of the ship might be applied in time policies; still in voyage policies the condition, into which the ship must be or must have been put at the commencement of the voyage insured, can be measured or estimated at the time of making the contract of insurance by reference to that named voyage; the ship must be or have been in such a condition at the commencement of the voyage insured as to be reasonably able to encounter the ordinary vicissitudes of an ordinary voyage of that kind. But in a time policy there is no voyage insured, there is no voyage named in the policy. The ship will have to sail a voyage or voyages, which are therefore the voyage or voyages sailed, not the voyage or voyages insured. But there is nothing in the contract of insurance to fix that voyage or

1875

DUDGEON v. PEMBROKE.

Brett, J.

those voyages. The assured may not have determined on any voyage, or if he has, may, consistently with the contract of insurance, change the destination of the ship. The ship may, during the time of insurance, sail a summer voyage along the coast, or a winter voyage round Cape Horn, or one or many voyages, beginning at any time. It would be impossible, at the time of making the contract, to anticipate what the condition of the ship must be where the risk is to attach or did attach. Neither the assured nor underwriter can make any calculation about it. It cannot be, therefore, properly laid down by the Courts, that all men of ordinary reason must have contracted upon the assumption of there being a warranty of seaworthiness, the burden of fulfilling which neither party could estimate.

In my judgment, this reasoning cannot be successfully answered. I am of opinion that there is no such warranty in any time policy in ordinary form.

As to the second proposition, with regard to every voyage, it was pointed out by Lord Campbell in *Fawcus* v. *Sarsfield* (1) that Mr. Wilde, with all his great experience and knowledge, did not contend for it, but asked for a warranty only as to the first voyage sailed under the policy. Lord Campbell gives his reasons for holding that there is no such warranty, as to any of the voyages sailed, under an ordinary time policy. I agree with those reasons. And certainly it would be strange to imply so futile a warranty as one confined to the first voyage, which might be to Cardiff in ballast, whilst the next should be to Calcutta or Hong Kong with coal, or railway iron, or machinery. I cannot think that there is any such warranty as is suggested in the second proposition with regard to any of the voyages. And if there be no such warranty as is suggested in either the first or second proposition, it follows, as it seems to me, that no undertaking of any kind by the assured can be implied with regard to the seaworthiness of the ship at any period of the time of insurance. There is nothing on which to found such an implication. In plain language the underwriter in a time policy, by his contract, insured against a loss by any perils described in the policy, whether the ship was or was not seaworthy when the risk attached or when the loss occurred. If, therefore,

(1) 6 E. & B. at p. 201; 25 L. J. (Q.B.) at p. 254. 2 Jur. N.S. 66

the underwriter can be absolved from a loss caused in any sense by unseaworthiness, it is not by virtue of anything within the contract.

If the loss be solely and immediately caused by unseaworthiness, which existed at the commencement of the risk and continued till the loss, without the happening of any peril described in the policy, then the underwriter is not liable, because the ship has perished by her own inherent vice. There is in such case but the one cause. There is, therefore, no opportunity for the application of the doctrine of causa proxima, which implies existence of two causes. But if the ship is proximately lost by a peril described in the policy, though the unseaworthiness existing from the beginning is also a cause, there arises the question whether the underwriter is liable. He is not absolved, if at all, by reason of a breach of contract. There is no contract about seaworthiness. And if there were, in considering an alleged breach of contract, it is recognised law that the causa proxima can alone be regarded. Even a particular and novel stipulation in a contract of insurance, it has been held, is to be construed or applied with reference to this maxim.

There is a case, as the law at present stands, in which the underwriter is absolved from the consequences of a loss caused by unseaworthiness, though the loss may also be said to have been immediately caused by a peril described in the policy. That is, where the ship is immediately lost by a peril described, but where the original and continuing unseaworthiness was also a cause, and the efficient cause of loss, in the sense that it substantially caused the described peril to destroy the ship. That is a state of things consistent with what is set forth in the 6th plea in this case, and in the 3rd plea in *Thompson* v. *Hopper*. (1) If such unseaworthiness was known to the assured before the ship went to sea, it was held in *Thompson* v. *Hopper* (1) that the underwriter is absolved. If it was not so known, it was held in *Thompson* v. *Hopper* (1) and in *Fawcus* v. *Sarsfield* (2) that he is not absolved. If it was known, it is said that the assured was guilty of a wrongful act, and that no man can recover an indemnity for a loss occasioned by his

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240.
(2) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

1875

DUDGEON v. PEMBROKE.

Brett, J.

own wrongful act; and it was held in *Thompson* v. *Hopper* (1) that "this is a fundamental principle of insurance law, which is inapplicable if the wrongful act causes a peril described in the policy to be the immediate and proximate cause of the loss of the ship." The head-note to *Thompson* v. *Hopper* (2) states that the latter part of the judgment of the Queen's Bench was overruled, and that even when there is a wrongful act of the assured, the causa proxima alone of the loss is to be regarded; and if the wrongful act of the assured be not the immediate and proximate cause of the loss, the underwriter is liable if the immediate and proximate cause be a peril described in the policy. Without determining whether this is the real effect of the judgment in error—which I more than doubt—I think it is clear from the judgments in the Queen's Bench that all depends on whether the act of the assured which is relied on is more than a breach of contract, whether it amounts to an act wrong of itself in the minds of all right-thinking people. It is suggested by Willes, J., whose opinion is to me always of the greatest consequence, that the mere fact of knowingly sending a ship to sea unseaworthy is not a wrongful act. I cannot agree. I will not argue about it. It seems to me self-apparent. It is a wrongful act to do in the judgment of all right-thinking people. But if the unseaworthiness is not known to the assured, I cannot see how in reason it can be said he has been guilty of a wrongful act. He may have taken all the pains and have gone to all the expense possible, and yet a secret defect may in the end be proved to have existed. How can he be said in reason to have been guilty of anything wrongful, it being assumed that he is not guilty of a breach of contract? Here the jury have negatived knowledge. There was, therefore, in my opinion, nothing wrongful in the conduct of the assured. Then the underwriters have no defence. The loss was not the immediate consequence solely of the unseaworthiness. The ship was not lost through her own inherent vice. She crossed the North Sea twice after the policy attached. She was lost by stranding; that was the causa proxima. There was nothing to prevent the application of that maxim. The evidence of the loss by stranding as a causa proxima was conclusive. Therefore the verdict was rightly entered on the 3rd issue.

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240. (2) In error, E. B. & E. 1038.

2 Jur. N.S. 609; 3 id. 133 5 Jur. N.S. 93.

That which must be taken to be a material allegation in the 6th plea, unless *Thompson* v. *Hopper* (1) and *Fawcus* v. *Sarsfield* (2) are to be overruled, was not proved. I think the demurrers in *Thompson* v. *Hopper* (1) and *Fawcus* v. *Sarsfield* (2) were rightly decided. Therefore the verdict was rightly entered on the 6th issue.

The judgment in the Queen's Bench was right, and should be affirmed.

The judgment of Lord Coleridge, C.J., and, in part, of Grove, J., was delivered by

LORD COLERIDGE, C.J. This was an appeal from a judgment of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants and for a new trial. The case is reported in Law Rep. 9 Q. B. 581. The judgment of the Court discharging the rule, delivered by my Brother Blackburn, enters so fully and clearly into the facts of the case, that the special case before us is little more than a repetition of his statements; and it seems unnecessary for the purpose of our judgment again to repeat them. Portions of the pleadings and the questions put to and answered by the jury on the trial it is, however, essential carefully to consider.

The declaration was on a policy, which, no doubt, is properly described as a time policy. But it is a policy in very different terms from the policies, sued on and which were the subjects of decision in *Gibson* v. *Small* (3) and *Thompson* v. *Hopper*. (1) The risk is thus described: "Lost or not lost, *at and from* —— for and during the space of twelve calendar months, commencing on the 24th day of January, 1872, and ending on the 23rd day of January, 1873 . . . . in port and at sea . . . . of and in the good ship *Frances, whereof* is *master* under God *for this present voyage* —— beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship *as above* . . . . and, further, until the said ship shall be *at as above* upon

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240.

(2) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

(3) 16 Q. B. 128, 141; 19 L. J. (Q.B.) 147; 20 L. J. (Q.B.) 152; 4 H. L. C. 353.

1875

DUDGEON v. PEMBROKE.

Lord Coleridge, C.J.

the said ship until she hath moored at anchor twenty-fours hours in good safety." The perils are described, so far as is necessary to set out the description, thus: "Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us *on this voyage*, they are of *the seas* . . . . and of *all other perils, losses, and misfortunes* that have or shall come to the hurt, detriment, or damage of the said goods, and merchandizes, and ship, &c., and every part thereof." The pleas which are material are the 3rd and 6th, which are in substance as follows:—The 3rd, "that the ship, &c., was not by the perils insured against, or any of them, lost as alleged." And the 6th, "that after the making of the policy the plaintiffs, well knowing that the ship was unseaworthy, without any justifiable cause, sent her to sea in such unseaworthy condition, and that the ship, &c., were lost as alleged by reason of such unseaworthiness of the said ship, *and not otherwise*."

At the end of the trial before my Brother Blackburn, he summed up the case to the jury, and left seven questions to them, which, with the answers, were as follows:—

"1. Was the representation made by the broker at the time of making the insurance, as to the condition of the vessel and as to the extent of examination, substantially correct?—Yes.

"2. Did that representation involve in it a statement that the vessel was to carry passengers, and consequently had been surveyed by the Board of Trade?—No.

"3. Was there a concealment from the underwriters of anything materially affecting the insurance which the plaintiffs knew and which the underwriters did not?—No.

"4. Was the fact that the ship had not been surveyed and certified for passengers one which under the circumstances was material?—No.

"5. Was the vessel seaworthy when she started?—*The jury cannot agree.*

"6. If not, was that known to the plaintiffs?—No.

"7. Was that unseaworthiness the cause of the loss?—*The jury cannot agree.*"

In asking the last question my Brother Blackburn explained to the jury that he did not mean to ask them whether the unsea-

worthiness was the *sole and immediate cause* of the loss; but whether the making water was occasioned by unseaworthiness, and the loss arose from her being water-logged in consequence of that unseaworthiness, so that, but for that, it would not have happened. (1)

Upon these findings of the jury my Brother Blackburn directed a verdict to be entered for the plaintiffs. A rule to set aside this verdict, and to enter it for the defendant, and for a new trial, was obtained; and was, after argument, discharged; and the question for us is whether it should have been discharged or made absolute.

It was contended before the Court of Queen's Bench, and for the purposes of the argument the contention was admitted, and the judgment proceeded on the admission, that the unanswered questions must be taken as answered in favour of the defendant; and that the jury must be taken to have found the ship unseaworthy; and, further, that the unseaworthiness contributed to the loss within the meaning of my Brother Blackburn's direction. But this being assumed, the judgment of the Queen's Bench proceeded, on the ground that, knowledge of unseaworthiness being negatived, the 6th plea was not proved; that, there being no implied condition of seaworthiness in a time policy, the unseaworthiness was no defence where the causa proxima of the loss was a peril of the sea.

It is manifest that two questions at once arise: 1st, Is there, *in such a policy as this*, no implied warranty of seaworthiness? And, 2nd, If there is not, still have the answers to the questions, interpreted by the direction of the learned judge, fairly disposed of the 3rd and 6th pleas?

As to the first point it appears that, though there are dicta, and dicta of great weight, which assume that in such a policy as this there is no implied warranty of seaworthiness, yet it has never been necessary to decide the point; and the point has not in fact been decided. Before the decision of *Gibson* v. *Small* (2) it had been assumed by text-writers, and had been laid down by some English judges—e.g., by Pattison, J., in *Hollingworth* v. *Brodrick* (3), and

(1) This is not stated in the case, but is in the judgment of Blackburn, J., Law Rep. 9 Q. B. at p. 591.

(2) 4 H. L. C. 353.

(3) 7 A. & E. at p. 48.

1875

DUDGEON v. PEMBROKE.

Lord Coleridge, C.J.

Tindal, C.J., in *Dixon* v. *Sadler* (1)—that in a time policy as in a voyage policy there was this implied warranty. The view was that by the mere fact of effecting the insurance, the assured warranted that there was a ship fit to be insured; and it was laid down in particular, that if the time policy was effected on a ship about to sail from a home port there was this implied warranty: see Park on Insurance, p. 489, ed. of 1842.

Then came the well known case of *Gibson* v. *Small* (2), in which the time policy had been effected on a vessel at sea. The Queen's Bench held that there was an implied warranty. The Exchequer Chamber reversed that decision, confining themselves, however, pointedly to the question of a time policy on a ship at sea. The case went to the House of Lords, and the judgment of the Exchequer Chamber was affirmed by the House of Lords, with the assent of the majority of the judges. In delivering judgment the judges who attended the House of Lords and the peers expressed opinions on the question of the implied warranty in time policies in general. But they did not agree. Lord Campbell, Pollock, C.B., and Parke, B., laid it down distinctly that there was no implied warranty in any time policy whatever. Lord St. Leonards agreed that in the case before the House, a time policy upon a ship then at sea, there was no implied warranty. But he said that "if a ship was about to sail upon a particular voyage, and a time policy instead of a voyage policy was effected upon her, as then advised he should think that a condition would be implied that the ship was seaworthy at the commencement of the voyage." Martin, B., was of the same opinion. And Maule, J., though not confidently, agreed with him. Three other judges,—Alderson and Platt, BB., and Talfourd, J.,—confined themselves to the case before the House. Erle and V. Williams, JJ., agreed with the original decision in the Queen's Bench. It is clear, therefore, that *Gibson* v *Small* (2) did not decide the point which the case before us raises. Neither, if it be carefully examined, did the later case of *Thompson* v. *Hopper* (3), at least as decided on demurrer. The policy there described the risk as "at and from the meridian of the

(1) 8 M. & W. at p. 898.
(2) 16 Q. B. 128, 141; 19 L. J. (Q.B.) 147; 20 L. J. (Q.B.) 152; 4 H. L. C. 353.
(3) 6 E. & B. 172; 25 L. J. (Q.B.) 240.

21st October, 1854, to and with the meridian of the 1st March, 1855, upon the ship," &c., and made no mention of a voyage. There were three pleas, which all averred that the ship, at the time of the insurance being effected, was "an outward bound ship, lying in a British port, to wit, the port of Sunderland." But the third plea contained an averment which the Court construed as charging personal misconduct on the plaintiffs, which misconduct produced the loss; and on this ground the Court unanimously held that plea to be a bar to the action. On the question of the implied warranty the Court was divided; and as there was agreement as to the third plea upon the reasons given, it was hardly necessary to decide upon the others. The majority of the Court, no doubt, held that there was no implied warranty in any time policy, although the policy before them was the only one which they were deciding. But, even if it were necessary to decide the point, the decision is one which does not bind this Court. The authority, indeed, of Lord Campbell, and of the judges who agreed with him, is entitled to the highest respect; and so is that of the judges composing the Judicial Committee, in *Jenkins* v. *Heycock* (1), who intimated that they were inclined to concur with Lord Campbell and those who thought that in no time policies is there any implied warranty, though they were not called upon to determine, and did not determine, the point. The later arguments and decisions in the same case of *Thompson* v. *Hopper* (2) took place after the case had been tried at nisi prius, and turn rather on the effect of my Brother Bramwell's direction, and on the finding of the jury on the facts, than on the specific point; though there is no doubt that several of the judges imply, if they do not say, that they agree upon this point with the majority in the Court below, and treat it as a settled one. The point, therefore, seems, upon examination, to be in this Court open; and if it be, there is considerable authority for holding that, in such a policy as this, there is an implied warranty of seaworthiness. Without exception, so far as I am aware, the American text-writers, and the American authorities, as cited in these text-writers, as well since as before the cases of *Gibson* v. *Small* (3) and *Thompson* v.

(1) 8 Moo. P. C. 351.
(2) 6 E. & B. 937; 26 L. J. (Q.B.) 441.
(3) 4 H. L. C. 353.

18; E. B. & E. 1038; 27 L. J. (Q.B.)

1875

DUDGEON v. PEMBROKE.

Lord Coleridge, C.J.

Hopper (1), hold that there is no difference on this point between a time policy on a ship then in port and to be employed on a voyage and a voyage policy; but that the difference is between such a time policy as last described and a time policy on a ship then at sea. The English authorities to the same effect have already been mentioned; and it is plain that the policy in the case before us is altogether different from that in *Gibson* v. *Small* (2), and is very distinguishable from that in *Thompson* v. *Hopper*. (1) In the present case the policy is, in fact, a voyage policy, limited to a particular time. The reasons given for implying a warranty of seaworthiness in voyage policies apply with equal strength to the policy before us. The main reason given for not implying a warranty, viz. that the ship-owner cannot know the state of the ship at the time of the insurance, certainly does not apply. The reason given by Lord Campbell, in *Thompson* v. *Hopper* (3), for not implying it, is not a reason of principle, but one ab inconvenienti, and would be equally cogent to establish any rule which excluded all dispute of fact. If the matter be, as I think it is, open, I confess to a strong feeling in favour of the older view of the law, except so far as it has been varied by authority. It seems to me that it is wiser and better, and to tend more towards honesty of dealing and against gambling and even fraud in insurance transactions, to extend, as far as may be, rather than to contract within the narrowest possible limits the doctrine of implied warranty of seaworthiness in a vessel at the inception of the risk. I am, therefore, prepared to hold that in this policy there is an implied warranty of seaworthiness; and on this ground, as the fifth question put by my Brother Blackburn is to be taken as answered for the defendant, I am of opinion that the judgment of the Court below was wrong, and that the rule should have been made absolute to enter a verdict for the defendant on the 3rd and 6th pleas. Inasmuch, however, as the case may go further, and inasmuch as the opinion I have expressed is at variance with dicta of great weight, as it is distinctly dissented from by some, and is not distinctly assented to by any, of my learned Brothers in this Court, it is proper to examine the second question, and arrive at a decision with respect to it.

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240.
(2) 4 H. L. C. 353.
(3) 6 E. & B. at pp. 188–189; 25 L. J. (Q.B.) at p. 247.

1875

DUDGEON v. PEMBROKE.

Lord Coleridge, C.J.

The question is: Do the findings of the jury, as explained by my Brother Blackburn (including the two which are to be taken as found in favour of the defendant), dispose of the questions arising on the 3rd and 6th pleas? And in discussing this question it is to be assumed that, in a time policy, when the loss is found to be by one of the perils insured against, even though the ship was unseaworthy when she started, the underwriters are liable.

Now it will be observed that the jury found that the unseaworthiness was one of the concurrent existing perils at the time of the loss. It will be further observed that they were not asked to find, and did not find, what was the efficient predominating peril at that same point of time. Yet it seems that, in a case such as this, the verdict would depend upon what the jury found as to this matter. If they had found that the unseaworthiness of the ship was the efficient predominating peril, then the verdict must have been entered for the defendant on the 3rd plea as well as on the 6th plea. If, on the other hand, they had found that the efficient predominating peril was the bad weather, then the verdict as now entered for the plaintiffs must have stood. This follows from the fair construction of the language of these pleas. They must mean (the 3rd) that the ship was lost through unseaworthiness; (the 6th) the ship was lost through unseaworthiness *alone*. The same question is involved in both, because the proper question upon the 3rd as upon the 6th would be: What was the efficient predominating cause of the disaster; was it the perils of the sea, or was it the inherent vice of the ship herself? A little consideration will make this reasonably clear. Seaworthiness and power to encounter ordinary perils are convertible terms. But the underwriter does not insure against ordinary perils; he indemnifies only against the extraordinary and unforeseen perils of the sea. "To make him liable," in the words of Lord Chief Justice Jervis in *Magnus* v. *Buttemer* (1), "the injury must be the result of something fortuitous and accidental occurring in the course of the voyage." He does not insure against inherent vice, or—what is the same thing in other words—against ordinary perils. In a voyage policy it is true the assured warrants power to encounter ordinary perils. Such perils, therefore, are not perils which, if

(1) 11 C. B. at p. 881; 21 L. J. (C.P.) 121.

1875

DUDGEON v. PEMBROKE.

Lord Coleridge, C.J.

they cause loss, give a right of recovery under such a policy, not merely because they are not within the words of the policy, but because a condition has not been complied with, viz. that the ship shall be fit to meet them. In this case there was no power to encounter ordinary perils, and by this want of power the loss was caused. It is none the less a cause of loss—the loss was no more caused by perils insured against—because in such a policy as this the assured has not to warrant the non-existence of the cause of loss at the beginning of the risk.

It may be said with truth that in this case there was evidence of two concurrent perils to which the ship was subject on her voyage, one a peril insured against—the extraordinary and unforeseen action of the sea; the other, a peril not insured against—the inherent vice of the ship herself. The evidence of both these perils should have been stated to the jury; and they should have been asked which was the efficient predominating peril when the loss happened. According to their answer to that question, the verdict should be entered for the plaintiffs or for the defendant on the 3rd plea or the 6th, the issues involved in both these pleas being substantially the same. The averment of knowledge in the 6th plea may be disregarded as being immaterial; and when that is done, the issues involved in the 6th plea are the same as the issues involved in the 3rd; and the answers given by the jury to the questions of the learned judge do not dispose of them. On this second ground, therefore, and for these reasons, I am of opinion that the rule should be absolute for a new trial.

I have authority from my Brother Grove to say that he agrees with this judgment as to the second point; and, as there are, therefore, four judges in favour of a new trial, the rule for a new trial will be absolute, and the judgment of the Court of Queen's Bench reversed.

Judgment reversed, and rule absolute for a new trial.

Solicitors for plaintiffs: *Cattarns, Jehu, & Cattarns.*
Solicitors for defendant: *Hollams, Son, & Coward.*

WALKER *v.* THE BANAGHER DISTILLERY COMPANY, LIMITED.

1875
Nov. 22.

Company—Voluntary Winding-up—Stay of Proceedings in Action—Companies Act, 1862 (25 & 26 *Vict. c.* 89) *ss.* 85, 138—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *subs.* 5.

An action having been brought in the Court of Queen's Bench against a company which was being voluntarily wound up, a Court of the Queen's Bench Division ordered the proceedings to be stayed under the Companies Act, 1862, ss. 85, 138, and the Judicature Act, 1873, s. 24, subs. 5.

ACTION for money paid against a limited company.

On the 18th of October, 1875, a resolution to wind up the company voluntarily was passed, and a liquidator appointed; this was confirmed by a general meeting on the 5th of November. The plaintiff was present at both meetings, and voted in favour of the resolution.

On the 22nd of October the writ in this action was issued.

Notice of the motion having been given under Order LIII., Rules 3 and 4,

F. M. White moved, on behalf of the liquidator, for an order to stay proceedings in the action. By s. 138 of the Companies Act, 1862 (25 & 26 Vict. c. 89), "Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court" (that is, by s. 81, the Court of Chancery,) "to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court . . . . if satisfied that . . . . the required exercise of power will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit." By s. 85, "The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon

1875

WALKER v. BANAGHER DISTILLERY COMPANY.

such terms as the Court thinks fit." But now, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, subs. 5, "No cause or proceeding at any time pending in the Supreme Court of Judicature, or before the Court of Appeal, shall be restrained by prohibition or injunction;" . . . . "Provided that nothing in this Act shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof . . . . shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

[QUAIN, J. This is precisely the case in which the Master of the Rolls differed from the Common Pleas Division. (1)]

Whether the Court of Chancery has jurisdiction or not, it seems clear that this Court, as a Divisional Court of the Queen's Bench Division of the High Court, in which the action is pending, has jurisdiction to stay the proceedings. In such cases as the present the Court of Chancery has always stayed the proceedings in the action, on the terms of the plaintiff being at liberty to add the costs of the action already incurred to his debt: see Lindley on Partnership, pp. 1311–1313.

The plaintiff did not appear to oppose the motion.

PER CURIAM (Mellor, Quain, and Field, JJ.):

Order as prayed. (2)

Solicitors for liquidator: *Thomas White & Sons.*

(1) See *Kingchurch* v. *People's Garden Co.*, 1 C. P. D. 45; and *In re People's Garden Co.*, 1 Ch. D. 44.

(2) See *Garbutt* v. *Fawcus*, 1 Ch. D. 155; and *Needham* v. *Rivers Protection and Manure Co.*, 1 Ch. D. 253.

SMITH *v.* KIRBY AND ANOTHER. 1875

Dec. 15.

Ship and Shipping—Action against Owner of Ship for Loss of Goods—Limit of Damages under Merchant Shipping Amendment Act, 1862 (25 & 26 *Vict.* c. 63), s. 54—*Right of Owner of Goods to Interest in Addition.*

The owners of a ship,—though their liability to damages in respect of the loss of goods owing to a collision is confined, by s. 54 of the Merchant Shipping Amendment Act, 1862, to an aggregate amount not exceeding 8*l.* per ton of the ship's tonnage,—are liable to pay interest on that amount from the date of the collision.

The Northumbria (Law Rep. 3 A. & E. 6) followed.

THIS was an action to recover the value of a cargo of maize of the plaintiff, which was lost on board the defendants' steamship *George Cairns*, owing to a collision.

At the trial before Lush, J., at the sittings in London after Trinity Term, 1875, the verdict was taken for the plaintiff, subject to a reference to an arbitrator as to the amount of damages.

The arbitrator gave his certificate for 9352*l.* 11*s.*

A rule was obtained, calling on the plaintiff to shew cause why the certificate should not be varied by reducing the amount of the damages to 9168*l.*, being the aggregate amount at 8*l.* per ton of the ship's tonnage, on the ground that the defendants were not liable for more under s. 54 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), the loss having occurred without the fault or privity of the defendants.

The 25 & 26 Vict. c. 63, enacts: "The owners of any ship, whether British or foreign, shall not,—in cases where all or any of the following events occur without their actual fault or privity, that is to say:

"1. Where any loss of life or personal injury is caused to any person being carried in such ship;

"2. Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

"3 Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat;

"4. Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or

1875

SMITH v. KIRBY.

boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;—

"be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage, without deduction on account of engine-room."

Cohen, Q.C., shewed cause. He contended that the plaintiff was entitled to interest on the aggregate amount, at 8*l.* per ton of the ship's tonnage, from the date of the collision, notwithstanding s. 54 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63): in which case the amount in the certificate was not too large, and the rule ought to be discharged. He read and relied on the judgment of the Admiralty Court in *The Northumbria* (1), where all the cases are cited in which the Court of Chancery, following the Court of Admiralty, had allowed such interest.

W. Williams, Q.C., in support of the rule, contended that there was a distinction in the present case, as there was here but a single claim, and not several, against the ship.

THE COURT (Blackburn, Quain, and Archibald, JJ.) were clearly of opinion that there was no distinction in the case; and that this Court ought to adhere to the established practice, and allow interest as claimed by the plaintiff; and discharged the rule.

Rule discharged.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

(1) Law Rep. 3 A. & E. 6.

EX PARTE C. R. COLVILLE. 1875 Nov. 18.

Justice of the Peace—Disqualification of Justice during his Shrievalty—1 Mary, sess. 2, c. 8, s. 2.

The statute 1 Mary, sess. 2, c. 8, s. 2,—which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise, in any county where he shall be sheriff during the time of his exercising the office of sheriff,—has not been affected by any subsequent addition to the duties of justices of the peace, and continues to disqualify a justice from acting as such while he holds office as sheriff

THE applicant, a justice of the peace for the county of Derby, was appointed high sheriff of the county. He applied during his shrievalty to be permitted to attend at the quarter sessions and read his report on the county bridges, notwithstanding the statute 1 Mary, sess. 2, c. 8, s. 2, which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise in any county where he shall be sheriff, during the time of his exercising the office of sheriff. The justices refused his application.

A. L. Smith moved for a rule for a mandamus to the justices, commanding them to admit the applicant to read his report. The statute 1 Mary, sess. 2, c. 8, s. 2, ought not to be held to disqualify the applicant from taking part in the financial duties of the justices, as the greater part of such duties have been created by legislation subsequent to the statute.

[COCKBURN, C.J. The statute 22 Henry 8, c. 5, gives justices power to tax the inhabitants of counties for the repair of bridges.]

PER CURIAM (Cockburn, C.J., and Mellor and Quain, JJ.). The statute 1 Mary, sess. 2, c. 8, has not been affected by any subsequent addition to the duties of justices of the peace, and still disqualifies a person from acting as justice while he holds office as sheriff.

Rule refused.

Solicitor for applicant: *F. C. Greenfield.*

1875
Nov. 17.

ATTWOOD, Appellant; CASE, Respondent.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 237—*Offence of boarding Ship "about to arrive at her Place of Destination before her actual arrival in Dock or at the Place of her Discharge.*

The respondent was charged under s. 237 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), with boarding without the permission of the master a ship "about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge."

The ship, at the time the respondent boarded her, had just entered the Cumberland Basin in the port of Bristol at 7 p.m. The basin is divided from the river Avon by dock gates, and is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks. There are quays in the basin, but the ship was not intended to discharge in the basin; she remained in the basin all night, and the next morning she was moored further in the floating harbour, and discharged her cargo at the quay there. The justices dismissed the complaint:—

Held, that the ship had not arrived "at her place of destination" by merely arriving in the port of Bristol, and that she had not "actually arrived at her place of discharge," which was the quay where she ultimately did discharge; but that she had "actually arrived in dock," within the meaning of the section, although the dock was not the dock in which she ultimately discharged; and that the justices' decision was therefore right.

Case stated by justices of Bristol under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, a police officer employed in the service of the Board of Trade, against the respondent, a sailors' boarding house keeper, for that he, not being in Her Majesty's service, and not being duly authorized by law for the purpose, unlawfully did go on board a British ship, the *Lord Duncan*, about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge, without the permission of the master of the ship, contrary to s. 237 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts:—

"Every person who, not being in Her Majesty's service, and not being duly authorized by law for the purpose, goes on board any ship about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge, without the permission of the master, shall for every such offence incur a

penalty not exceeding 20*l.*; and the master or person in charge of such ship may take any such person so going on board as aforesaid into custody, and deliver him up forthwith to any constable or peace officer, to be by him taken before a justice or justices, or the sheriff of the county in Scotland, and to be dealt with according to the provisions of this Act."

The *Lord Duncan* arrived from a foreign port on Sunday, the 4th of July, and passed through the gates of the Cumberland Basin in the port of Bristol about seven o'clock in the evening.

Immediately after the ship had entered the basin, the appellant, who is specially employed by the Board of Trade for the purpose, went on board and introduced himself to the master, and remained on board with his permission; and very shortly afterwards, and whilst the ship was being moored, the respondent went on board her, his alleged object being to see one of the crew. He spoke to the master, but did not obtain permission to remain on board, the master telling him he was not wanted. The respondent went away from the ship, and returned on board again shortly afterwards, and he then refused to leave when requested by the appellant so to do.

The crew left the ship in the basin, which is usual, and the ship remained there all night.

The next morning she was moored further into the floating harbour, and afterwards discharged her cargo at another quay in the port of Bristol.

Cumberland Basin is divided from the river Avon by dock gates, and is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks formed under and governed by the Bristol Dock Act, 1848, and other local Acts. There are quays on each side of the basin, at which ships frequently discharge cargoes; but the *Lord Duncan* did not discharge, and it was not intended that she should discharge any of her cargo there.

On behalf of the respondent it was contended that the section being penal must be read strictly, and that the words were alternative, so that it was enough to take his acts out of the provisions of the statute if the vessel could be said to have arrived,

1875

ATTWOOD v. CASE.

first, "at her place of destination;" or, secondly, "in dock;" or, thirdly, "at the place of her discharge." But in this case, as to all three phrases, it was urged, as a fact, that she had arrived at her place of destination; that she was in dock; and that she had also arrived at the place of her discharge.

On behalf of the appellant it was contended that it was not sufficient that the vessel had arrived in port to exempt a person acting as the respondent had acted from being amenable to the statute; that so long as she had not arrived "at the place of her discharge" he could not board her without permission of the master; and that it was not until Monday, the 5th of July, that the *Lord Duncan* arrived at the place of her discharge.

The justices decided as follows:—

First, that the ship was not "about to arrive at the place of her destination" (which, having regard to the section, they considered a condition precedent to bring the respondent within its words), as she had actually arrived there, that is to say, she had arrived at Bristol.

Secondly, that she was "in dock," that is to say, in the Cumberland Basin.

Thirdly, that she had arrived "at the place of her discharge," which was Bristol, although she was not then actually at the quay at which she was afterwards unloaded; for that precise locality as to all ships entering the port depends more or less upon the Bristol quay warden's arrangements, and upon various circumstances over which owners and masters of ships have no control or foreknowledge.

And the justices accordingly dismissed the complaint.

C. Bowen, for the appellant.

[BLACKBURN, J. The first and third findings of the justices seem to be precisely what the words "actual arrival" were intended to prevent. But had not the vessel actually arrived in dock?]

She had actually arrived in dock, no doubt, but not the dock in which she was to discharge; the intention was to prevent the ship being boarded by crimps before a vessel had come to her place of discharge, whether in dock or at a quay not in dock. The word

"quay" occurs in the corresponding repealed section (s. 9) of 8 & 9 Vict. c. 116. "Actual arrival" must be equivalent to final arrival.

H. T. Cole, Q.C., for the respondent, was not heard.

BLACKBURN, J. I think the decision of the justices must be affirmed on their second finding, that the vessel had arrived in dock. I do not think there is anything to be found in the Act to support the other two findings. The section imposes a penalty on every person "who goes on board a ship about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge." Now, it seems idle to say that the port of Bristol was the vessel's place of destination in the sense intended by the section; nor had she arrived at the place of her discharge, which was the quay where she did ultimately discharge. But I think she had actually arrived in dock when she entered the Cumberland Basin. Mr. Bowen would read the words "before her actual arrival in dock, or at her place of discharge" as if the arrival in dock would not terminate the liability to a penalty on a person boarding a ship, if she had not arrived in the dock where she was intended to be discharged, that is, before her actual arrival in the dock in which the quay or place of her discharge is situate. But that would be to read the words as if they were "before her actual arrival in the dock or at other the place of her discharge." The meaning of the section seems to be that the mere arrival at a port will not be sufficient, the vessel must either have got to the place of her discharge, if at a quay or other place outside, but not in, a dock; or if there is a dock, and she has got inside that, that is sufficient; and she then is no longer about to arrive at her place of destination, but has arrived. Then, here, the vessel was inside the dock, and therefore the decision of the justices was right.

MELLOR, J. I am of the same opinion, and for the same reasons.

QUAIN, J. Looking at the section, I cannot say the vessel had not arrived in dock within the meaning of it. The ship must have arrived in dock, or at the place of her discharge when she is not to be discharged in dock. There are many ports in which ships are discharged from quays or by lighters without going into dock at

1875

ATTWOOD v. CASE.

all. On this ground, therefore, I think the judgment of the justices was right. On the other two grounds I agree with my Brother Blackburn that they were wrong.

Judgment for the respondent.

Solicitors for appellant: *White, Renard, & Co., for Press & Inskip, Bristol.*

Solicitors for respondent: *Darley & Cumberland, for J. H. Clifton, Bristol.*

Dec. 14.

HUTCHINSON AND ANOTHER *v.* GLOVER AND OTHERS.

Discovery and Inspection—Agreement of Compromise relating to Subject-matter—Suit between Defendant and third Party—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *Schedule, Order XXXI., Rules* 11, 12, 13, 18.

The plaintiffs were the owners of goods shipped on board the defendants' vessel the *B.*, and their case was, that the goods had been lost through a collision between the *B.* and the *H.*, owing to the defendants' negligence. A suit and cross suit had previously been commenced in the Court of Admiralty between the owners of the two vessels, and these suits were compromised by a private agreement in writing:—

Held, that the plaintiffs were entitled to inspection of this agreement with an average statement attached to it: for that, without deciding that such an objection would be material, it did not appear that the owners of the *H.* objected to the inspection; and the document clearly related to the matter in question, as it might contain an admission of liability on the part of the defendants.

MOTION to vary an order of Quain, J., at Chambers, granting the plaintiffs inspection of an agreement, with an average statement attached to it, in the possession of the defendants. (1)

(1) The following are Rules of Court relating to discovery and inspection under the Supreme Court of Judicature Act, 1875, 38 & 39 Vict. c. 77:—

Order XXXI., Rule 11: "It shall be lawful for the Court, or a judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or judge shall think right, and the Court may deal with such documents when produced in such manner as shall appear just.

"12. Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are, or have been, in his possession or power relating to any matter in question in the action.

"13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule

It appeared that the action was brought for damage to goods shipped and consigned to the plaintiffs on board the *Burlington*, of which the defendants were owners. The damage was caused by a collision between the *Burlington* and another vessel called the *Hakon Adelsteen*, which was alleged to have happened through the defendants' negligence. A suit and cross-suit had been instituted in the Court of Admiralty, to which the owners of the *Burlington* and of the *Hakon Adelsteen*, suing on behalf of their respective underwriters, were parties, the question being which of the two vessels was to blame for the collision; and an agreement for carrying out a private arrangement to put an end to litigation in the two suits was entered into between the owners of the vessels, and an average statement was made on the basis of this agreement. In compliance with an order for discovery, the defendants scheduled this agreement, and objected to produce it on the ground that it was res inter alios acta and irrelevant. The order in question was then made,

J. Witt, in support of the motion. The document is not one of which inspection ought to be granted. In *Warrick* v. *Queen's College, Oxford* (1), a suit between the freeholders of a manor and the lords, Lord Romilly refused to order the defendants to produce documents relating to the compromise of a dispute as to their rights between them and the War Office, saying that he expressed no opinion on what might be the case if the War Office were parties to the suit.

[BLACKBURN, J. That decision seems to proceed on the technical ground that in a bill of discovery you must make all the parties interested defendants.]

The document here is one in which other parties besides the de-

---

has been made, shall specify which, if any, of the documents therein mentioned he objects to produce. . . ."

"18. Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party."

(1) Law Rep. 4 Eq. 254.

1875

ENGLISH v. TOTTIE.

to inspect documents referred to in the defendant's answer to interrogatories, by limiting the inspection to the documents referred to in the first schedule to the answers.

It appeared that the action, which was commenced on the 25th of January, 1875, was for breach of an agreement in May, 1874, by which the defendant undertook to deliver to the plaintiff, free on board at Kemi, in Sweden, a quantity of wood, to be sawn at the Kemi Company's Steam Saw Mills; the declaration stating that the wood delivered was not according to contract. In answer to interrogatories, the defendant stated that he purchased the wood from the Kemi Company through the agency of the Gothenburg Commercial Company, and that on the 18th of December, 1874, the defendant sent by letter from London to the Gothenburg Company copies of two letters which he had received from the plaintiff's attorneys relating to the claims made by him in this action, and he requested the Gothenburg Company to obtain information respecting these claims; and that the defendant afterwards, on the 11th of January, 1875, being then in Sweden, entered into an agreement with the Gothenburg Company, which recited that the Kemi Company had made a contract with the defendant in April, 1874, respecting the delivery of wood, that he had refused to pay the invoice price, and that it had been agreed that the defendant should have deducted from the balance due from him 2223*l.* 17*s.* 11*d.* In consideration of this deduction the defendant agreed to release all claims in respect of the shipments already made. The documents in the second schedule to the affidavit were a list of letters between the 23rd of November, 1874, and the 20th of May, 1875, which passed between the Gothenburg Company and the defendant. These letters the defendant objected to produce on the ground that they were confidential communications after claim made.

W. B. Cooper, in support of the motion, put in the letters to be read by the Court, and contended that, having been written for the purpose of obtaining evidence, they were not subject to inspection.

[BLACKBURN, J. I think that the practice as to discovery ought now to be more conformable to that in equity. It may therefore be desirable to look at the equity decisions.]

1875

ENGLISH v. TOTTIE.

In *Ross* v. *Gibbs* (1), Stuart, V.C., says that information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it was procured through a solicitor. The object of the present correspondence was to inquire into the defence to the action.

Benjamin, Q.C., and *Graham*, shewed cause. The letters are not privileged. They are not papers which would constitute a brief, or which were prepared as part of the defendant's case in view of litigation. The defendant cannot swear that these letters were instructions which he was taking in advance for his brief.

[BLACKBURN, J. The rule would seem to be that each party ought to be put in the same position as the other with regard to the facts. The only restriction on this rule is that it is public policy that every one should be able to confide in his legal advisers.]

The law, to be gathered from *Fenner* v. *London and South Eastern Ry. Co.* (2), *Skinner* v. *Great Northern Ry. Co.* (3), and *Malden* v. *Great Northern Ry. Co.* (4), in spite of some conflict of opinion between the Courts of Queen's Bench and Exchequer, is that communications with a person not a solicitor, though taking place after litigation is contemplated, are not necessarily privileged, but that it is in the discretion of the Court to compel or abstain from compelling their production.

[FIELD, J., referred to *Smith* v. *Daniell* (5) and Order XXXI. in the Schedule to the Judicature Act, 1875. (6)]

The new practice has made no difference in the powers of the Court.

COCKBURN, C.J. In this case I had at first some doubt, but upon consideration I think that the inspection must be enforced. It appears that the defendant was the purchaser of a quantity of wood, in Sweden, from the Kemi Company, and that before this wood was shipped he re-sold it to the plaintiff. A portion of the wood is shipped to the plaintiff, and complaints are made by him that it is not according to contract. The defendant writes to the

(1) Law Rep. 8 Eq. 522.
(2) Law Rep. 7 Q. B. 767.
(3) Law Rep. 9 Ex. 298.
(4) Law Rep. 9 Ex. 300.
(5) Law Rep. 18 Eq. 649.
(6) See ante, note (1), p. 138.

1875

ENGLISH v. TOTTIE.

company to know whether these complaints are well founded, and a correspondence ensues, the result of which is that he receives a large compensation from the company. Now, there can be no doubt that the plaintiff is entitled to avail himself of this fact as evidence that the wood was not according to contract. But the plaintiff is not satisfied with this, but says, "I am entitled to be put in possession of the information of which you have had the benefit, I shall then be enabled to have recourse to different sources of evidence; but at present I cannot ascertain who are the persons from whom your information has been derived." Now, I think it just and reasonable that the plaintiff, as far as possible, should be put in possession of all the facts of the case; and if this information is in the breast of the defendant, it is right that it should be disclosed. The plaintiff could obtain this information from the defendant by cross-examination at the trial, and then, if necessary, apply to have the trial postponed, but this would be obviously inconvenient; or perhaps he could obtain it by interrogatories, but it is very undesirable that he should only be able to learn by long interrogatories what he could at once find in the correspondence itself. This correspondence may probably not be legal evidence, but the facts which it contains are facts which may probably be evidence, and which ought to be brought to the knowledge of the plaintiff.

BLACKBURN, J. I am of the same opinion. The general rule as to the discovery of documents is laid down in *Fenner* v. *London and South Eastern Ry. Co.* (1), that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to the exceptions, first,—which is an exception by right,—of communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice; and, secondly,—an exception which is in the discretion of the Court to allow,—of communications made with a person not himself a solicitor, but which can be considered as made with him as deputy for the solicitor. Now, the Courts of Exchequer and Common Pleas, in the exercise of this discretion, have gone further than this Court in refusing applications for

(1) Law Rep. 7 Q. B. 767.

1875

ENGLISH v. TOTTIE.

inspection, and it is not for me to say which course is right. But in the present case the correspondence is in no sense the work of an attorney. It consists of independent communications with third persons, which ended in the defendant receiving large compensation, and I do not see why the plaintiff should not see them. Whether, under the new practice, we have a discretion to refuse inspection in cases where a Court of Equity has been in the habit of granting discovery, is a point which we need not decide at present, but which may probably at some time come before the Court of Appeal. It is enough to say that the present case is not brought within any of the exceptions which have hitherto been allowed.

FIELD, J. I am of the same opinion. The defendant has not brought the case within the exceptions laid down in the Courts of Law and Equity.

Order refused.

Solicitors for plaintiffs: *Clarkes, Rawlins, & Clarke.*
Solicitors for defendants: *Barnes & Bernard.*

WADLING *v.* OLIPHANT.
EVANS, GARNISHEE; MORRIS, CLAIMANT.

Dec. 16.

Bankruptcy—Bankrupt without Order of Discharge—Trustee's Title to After-earnings of Bankrupt—Proceeds of Personal Labour—Money recovered by Bankrupt as Compensation for Breach of Contract.

A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court 104*l.* as six months' salary in lieu of proper notice of dismissal:—

Held, that the bankrupt's trustee could claim this money before it was paid to him, as against any creditors, subsequent to and without notice of the bankruptcy; for that, first, the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy.

MOTION calling upon the garnishee to shew cause why he should

1875

ENGLISH v. TOTTIE.

company to know whether these complaints are well founded, and a correspondence ensues, the result of which is that he receives a large compensation from the company. Now, there can be no doubt that the plaintiff is entitled to avail himself of this fact as evidence that the wood was not according to contract. But the plaintiff is not satisfied with this, but says, "I am entitled to be put in possession of the information of which you have had the benefit, I shall then be enabled to have recourse to different sources of evidence; but at present I cannot ascertain who are the persons from whom your information has been derived." Now, I think it just and reasonable that the plaintiff, as far as possible, should be put in possession of all the facts of the case; and if this information is in the breast of the defendant, it is right that it should be disclosed. The plaintiff could obtain this information from the defendant by cross-examination at the trial, and then, if necessary, apply to have the trial postponed, but this would be obviously inconvenient; or perhaps he could obtain it by interrogatories, but it is very undesirable that he should only be able to learn by long interrogatories what he could at once find in the correspondence itself. This correspondence may probably not be legal evidence, but the facts which it contains are facts which may probably be evidence, and which ought to be brought to the knowledge of the plaintiff.

BLACKBURN, J. I am of the same opinion. The general rule as to the discovery of documents is laid down in *Fenner* v. *London and South Eastern Ry. Co.* (1), that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to the exceptions, first,—which is an exception by right,—of communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice; and, secondly,—an exception which is in the discretion of the Court to allow,—of communications made with a person not himself a solicitor, but which can be considered as made with him as deputy for the solicitor. Now, the Courts of Exchequer and Common Pleas, in the exercise of this discretion, have gone further than this Court in refusing applications for

(1) Law Rep. 7 Q. B. 767.

1875

ENGLISH v. TOTTIE.

inspection, and it is not for me to say which course is right. But in the present case the correspondence is in no sense the work of an attorney. It consists of independent communications with third persons, which ended in the defendant receiving large compensation, and I do not see why the plaintiff should not see them. Whether, under the new practice, we have a discretion to refuse inspection in cases where a Court of Equity has been in the habit of granting discovery, is a point which we need not decide at present, but which may probably at some time come before the Court of Appeal. It is enough to say that the present case is not brought within any of the exceptions which have hitherto been allowed.

FIELD, J. I am of the same opinion. The defendant has not brought the case within the exceptions laid down in the Courts of Law and Equity.

Order refused.

Solicitors for plaintiffs: *Clarkes, Rawlins, & Clarke.*
Solicitors for defendants: *Barnes & Bernard.*

WADLING *v.* OLIPHANT.
EVANS, GARNISHEE; MORRIS, CLAIMANT.

Dec. 16.

Bankruptcy—Bankrupt without Order of Discharge—Trustee's Title to After-earnings of Bankrupt—Proceeds of Personal Labour—Money recovered by Bankrupt as Compensation for Breach of Contract.

A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court 104*l.* as six months' salary in lieu of proper notice of dismissal:—

Held, that the bankrupt's trustee could claim this money before it was paid to him, as against any creditors, subsequent to and without notice of the bankruptcy; for that, first, the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy.

MOTION calling upon the garnishee to shew cause why he should

1875

WADLING v. OLIPHANT.

not pay to the judgment creditor the sum of 104*l.*, due from the garnishee to the judgment debtor.

It appeared that in June, 1869, Oliphant was adjudged bankrupt, and he had never obtained an order of discharge or passed his final examination. After his bankruptcy he obtained employment as editor of a weekly newspaper at a salary of 208*l.* per annum, without the consent or permission of his trustee. On the bankruptcy of Messrs. Stiff and Flower, the proprietors of this newspaper, he continued to act as manager of the paper under the direction of their trustee, L. H. Evans. Subsequently, on the sale of the newspaper in January, 1875, he was dismissed, and on the 15th of July, 1875, the Lords Justices made an order that Evans should pay him 104*l.* as six months' salary in lieu of notice. In February, 1875, Wadling, who had no notice of the bankruptcy, had obtained judgment against Oliphant, for the amount of two bills of exchange accepted by him long after his bankruptcy; and on the 16th of July, 1875, Wadling obtained an order attaching all debts due to Oliphant from Evans. Upon the return of the garnishee summons before Cleasby, B., at chambers, Morris, the trustee under Oliphant's bankruptcy, appeared and claimed the money due to Oliphant from Evans, as part of the bankrupt's estate, and the learned Baron referred to the Court the question whether Morris, the trustee and claimant, or Wadling, the judgment creditor, was entitled to the money.

H. Payne, in support of the motion. First, the bankrupt having been allowed to acquire this money by the laches of the trustee, the claim of subsequent creditors to it should be preferred, on principles of equity. In *Engelback* v. *Nixon* (1), where a bankrupt was allowed to carry on business for the benefit of his creditors, and acquired furniture which a new creditor seized under an execution; the title of this creditor was upon an interpleader issue preferred to that of the trustee in bankruptcy. So here, the trustee cannot claim the money as against subsequent creditors without notice. In *Ex parte Bourne* (2), Lord Eldon says, that where a bankrupt has been permitted to go into the world as a trader and to gain credit as such, whatever a Court of Law

(1) Law Rep. 10 C. P. 645. (2) 2 G. & J. at p. 141.

might say about the rights of the creditors under a first commission, the Bankruptcy Court would not permit the creditors under a first commission to take that which they could not take without injustice to the creditors under the second commission.

[BLACKBURN, J. It is not enough that the judgment creditor has no notice of the bankruptcy. Has the trustee so conducted himself that a subsequent creditor can say, as in *Pickard* v. *Sears* (1), You must not set up your right against me?]

Secondly, the money due to the bankrupt is not property of which his trustee can take possession. In *Williams* v. *Chambers* (2), the assignee of an insolvent debtor sued for commission which became due to the debtor between the vesting order and the order for his discharge. It was pleaded that the money was due in respect of the personal labour of the debtor after the vesting order. It was held that the plea was good, for if the plaintiff were entitled to recover in respect of such a claim the assignees might, in the words of Lord Mansfield in *Chippendall* v. *Tomlinson* (3), let the insolvent out to hire and contract themselves for his personal labour.

[BLACKBURN, J. The plea there contained an averment that the work was done for the necessary present maintenance and support of the debtor and his family.]

The Court recognized the distinction as to the proceeds of personal labour in *Crofton* v. *Poole.* (4)

[ARCHIBALD, J. Do you say that in all cases of money earned by the personal labour of a bankrupt after his bankruptcy, the assignees of an uncertificated bankrupt cannot sue? Suppose the bankrupt were an actor making thousands a year?]

The assignees in such a case could not recover. In *Ex parte Dewhurst* (5), where a bankrupt before his discharge, entered into employment at a salary, and it was agreed that he should leave on receiving 200*l.* compensation, and he afterwards paid 130*l.* of this money as rent in advance, the landlord having no notice that the bankruptcy was open, it was held by the Lords Justices that the amount could not be recovered back by the assignees.

(1) 6 Ad. & E. 469.
(2) 10 Q. B. 337.
(3) 4 Dougl. 318; 1 Co. Bank. Law, 8th ed. 428.
(4) 1 B. & Ad. 568.
(5) Law Rep. 7 Ch. 185.

1875

WADLING v. OLIPHANT.

[QUAIN, J. James, L.J., in his judgment, says: "The bankrupt in the present case has taken a house and paid rent for it out of money which, no doubt, the trustee had a right to intercept, and which, if he had given the proper notice, he probably could have intercepted." Here the trustee is seeking to intercept the money.]

The trustee allowed the debtor to earn the money and to obtain credit on the faith that he was in a position to pay his debts.

Holl, for Morris, the trustee and claimant, was directed by the Court to confine his argument to the second point, as to whether the 104*l.* were the proceeds of the bankrupt's personal labour, and could be claimed by the trustee. *Ex parte Dewhurst* (1) is exactly in point. Lord Mansfield, in *Chippendall* v. *Tomlinson* (2), was speaking of the earnings of a bankrupt which are absolutely necessary for his maintenance.

[ARCHIBALD, J. The expenses of a man's maintenance must vary with his social position. Is the debtor entitled to everything which would come under the description "necessaries," in the case of an infant?]

Primâ facie the trustee is entitled to claim all money in the possession of an uncertificated bankrupt. It is for the bankrupt to make out that it is necessary for his maintenance.

[BLACKBURN, J. In *Beckham* v. *Drake* (3), where it was held that the right of action for breach of an agreement to employ the bankrupt at a salary passed to his assignees, Parke, B., lays stress upon the circumstance of the breach being before the bankruptcy. At the same time he seems to consider that the benefit of a contract for the future personal services of the bankrupt would not pass to his assignees.]

That case draws a distinction between money due as a compensation for dismissal, and money payable for future personal services.

H. Payne, in reply.

BLACKBURN, J. I think that we must order the money in question to be paid to Morris, the trustee in bankruptcy of the judg-

(1) Law Rep. 7 Ch. 185.
(2) 4 Dougl. 318; 1 Co. Bank. Law, 8th ed. 428.
(3) 2 H. L. C. 579.

ment debtor. Two grounds, with one of which we did not trouble Mr. Holl, were relied on by the judgment creditor. The first was based on the authority of the case of *Engelback* v. *Nixon*. (1) Now I do not quarrel with that case, but I say that it has no application here. There the trustee in bankruptcy had requested the bankrupt to carry on his trade; he did carry on the trade, and in the course of trading acquired property which one of his new creditors seized, and the Court of Common Pleas said, where the trustee enabled the bankrupt to act as if he were sui juris, and to acquire property, that then on the principle laid down in *Pickard* v. *Sears* (2) the new creditor has an equity as between himself and the trustee to treat the property as though it belonged to the bankrupt. In the present case there is no pretence for saying that there is anything like holding forth the debtor as a person entitled to earn money on his own account and to retain it. The bankrupt could of course earn money; the trustee could not prevent him, but it was competent for the trustee from time to time to call upon the bankrupt to pay over money earned by him, and any fresh creditors had no equity in it.

The second ground involves more difficulty. It turns upon the nature of the debt due from the garnishee. This debt is not due as wages, but is a sum awarded to the bankrupt by the Court of Chancery. It seems that the bankrupt was editor of a newspaper at a salary of 208*l.* a year, and that, upon the determination of his contract the Lords Justices awarded him six months' salary in lieu of notice. Now the point taken on behalf of the execution creditor was founded on the case of *Williams* v. *Chambers* (3), where, in an action by the assignee of an insolvent debtor for work done by the debtor before his final discharge, the plea was that the work was the personal labour of the insolvent after the vesting order, and the money payable for it not more than was sufficient for the necessary support of the insolvent and his family. It was held that the assignee could not claim this money, the price of the personal services of the insolvent. Now, whether that judgment applied to such

(1) Law Rep. 10 C. P. 645. (2) 6 Ad. & E. 469.
(3) 10 Q. B. 337.

1875

WADLING v. OLIPHANT.

part only of his earnings as was reasonably necessary for his subsistence does not appear. It is unnecessary to say whether it would extend to the case of an actor or a professional man who makes a large income, and whether, in such a case, the assignees could make no claim. Here we are dealing with an ascertained sum awarded for breach of an engagement to employ a man in futuro, which by no means comes within the declamatory remarks of Lord Mansfield in *Chippendall* v. *Tomlinson* (1), that to give the assignee a right to it would enable him to employ the bankrupt as a slave. The case is therefore not within *Williams* v. *Chambers* (2); and the question whether such a sum of money would pass to the assignees where the breach was before the bankruptcy was decided in *Beckham* v. *Drake* (3), which is a very analogous decision. There, the main point considered in the House of Lords was, whether the penalty became due before or after the bankruptcy, and it was decided that although perhaps the right to recover all the ordinary damages for the breach of the contract would not pass to the assignees, as the action was commenced after the bankruptcy, yet that they could seize a sum of money which had been agreed to be paid as compensation when the first breach took place. With regard to the decision of the Lords Justices in *Ex parte Dewhurst* (4), I need only say that it may well be that where a sum of money in hard cash is paid to an innocent creditor he cannot be ordered to refund it; but a judgment recovered by a creditor is not the same thing as a payment made to him, and, indeed, the argument that the two cases are similar scarcely needs an answer.

It is unnecessary to decide whether, if an undischarged bankrupt were to make a large salary beyond what he could reasonably require for his support, the surplus amount in his possession is or is not protected from his assignees. What we decide is, that this was a compensation awarded for breach of a contract, and not money earned by the bankrupt's personal services.

QUAIN, J. I am of the same opinion on both points. With regard to the first, there is nothing to bring the case within the

(1) 1 Co. Bank. L. 432.
(2) 10 Q. B. 337.
(3) 2 H. L. C. 579.
(4) Law Rep. 7 Ch. 185.

principle of *Engelback* v. *Nixon* (1), that the assignees of an uncertificated bankrupt are not to lie by and enable the bankrupt to deceive people as to his position. With regard to the second question, it is one of greater difficulty. I think that this money is not earned by the personal labour of the bankrupt, but a compensation for dismissing him without notice, which was fixed and ascertained by the judgment of the Lords Justices, and is as much part of the personal estate of the bankrupt as the compensation due to the bankrupt in *Beckham* v. *Drake*. (2) That case turned entirely on the point whether the penalty due to the bankrupt became due before or after the bankruptcy, and it was on this point that Parke, B., changed the opinion which he had entertained in the Court below. Both Lord Campbell and Maule, J., when the case was before the House of Lords, state that the agreement of the parties that money shall be paid as compensation makes the right to recover that money part of the personal estate of the bankrupt. Here the money is a sum awarded for breach of a contract to employ the bankrupt. Moreover, *Ex parte Dewhurst* (3) is precisely in point, for the decision of the Lords Justices amounts to this, that if the money is intercepted by the assignees, as it was here, it will pass to them as against new creditors.

ARCHIBALD, J. I am of the same opinion. With regard to the first point, there is nothing in the case to which the doctrine of *Pickard* v. *Sears* (4) can apply. With regard to the second point, whether the money is part of the bankrupt's estate which would vest in the trustee, the general principle is that the property of the debtor passes to his assignees, and in order to divest it the case must be brought within some recognised exception. The exception relied upon here is that the money is due for the personal labour of the bankrupt. Now the cases do shew that there is a rule, the extent and limit of which is not exactly defined, by which the bankrupt, after the date of his bankruptcy, may, in certain cases, keep the produce of his personal labour. Whether he is entitled in all cases so to retain it we need not discuss, for

(1) Law. Rep. 10 C. P. 645.
(2) 2 H. L. C. 579.
(3) Law Rep. 7 Ch. 185.
(4) 6 Ad. & E. 469.

1875

WADLING v. OLIPHANT.

the ground of our present decision is that the money is not within that class of cases. The sum awarded by the Lords Justices as damages for improper dismissal amounts to the same thing as if there had been originally a stipulation in the agreement that in the event of the contract being determined a sum of money should be paid. Such a sum would, no doubt, be for the benefit of the bankrupt's estate and would pass to his assignees. It follows that this is a sum to which the trustee is entitled.

Judgment for the claimant.

Solicitor for judgment creditor: *H. Montagu.*
Solicitors for claimant: *Lewis, Munns, & Longden.*

Dec. 18.

THE QUEEN *v.* THE TREASURER OF THE BOROUGH OF NEW WINDSOR.

Municipal Corporation Act (5 & 6 *Wm.* 4, *c.* 76), *ss.* 112, 117—*Borough "liable to contribute in Whole or in Part to County Rate"—District liable to County Rate added to Borough by* 2 & 3 *Wm.* 4, *c.* 64.

By the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 112, within ten days after the grant of a separate court of quarter sessions of the peace to any borough, every part of such borough shall be free from contributing otherwise than as hereinafter provided to any rate for the county in which the borough is situated.

By s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the cost arising out of the prosecution, &c., of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroners' inquests; and shall, not more than twice in every year, send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed, upon such borough as the same shall be bounded according to the provisions of this Act.

Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included one part of the parish of Clewer in Berks which was exempt from the county rate, and on the passing of the Act a further part of the parish, which up

to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made co-extensive with those of the parliamentary borough. The borough has a court of quarter sessions and a charter containing a non-intromittant clause:—

Held, that the word "borough," in the expression in s. 117, "borough liable to contribute in whole or in part to the county rate," must be taken to mean "area of borough," and New Windsor was therefore liable to contribute under 5 & 6 Wm. 4, c. 76, s. 117, in respect of the part of Clewer which, before 2 & 3 Wm. 4, c. 64, was liable to contribute.

Affd on appeal 2 QBD. 544.

Rule calling upon certain justices of Berkshire and the treasurer of the borough of New Windsor to shew cause why a mandamus should not issue commanding the justices to hear and determine a matter of complaint preferred before them against the treasurer by the treasurer of the county.

The facts as disclosed by the affidavits were that, prior to the year 1832, the borough of New Windsor consisted of the parish of New Windsor and part of the parish of Clewer which had never been liable to the county rate. The borough had from time beyond memory a separate court of quarter sessions and its charter contained a non-intromittant clause.

By the Boundaries Act, passed in 1832 (2 & 3 Wm. 4, c. 64), a further part of the parish of Clewer, which had previously been liable to the county rate, was added to the borough for parliamentary purposes, but still remained for all other purposes part of the county.

By the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76 (1),

(1) By the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 112, within ten days after the grant of a separate court of quarter sessions of the peace to any borough, the council of such borough shall send a copy of such grant sealed with the seal of the borough to the clerk of the peace of the county in which such borough, or any part thereof, is situated, and after the grant of such court to any borough it shall not be lawful for the justices of the peace of any county wherein such borough, or part of such borough, is situate to assess any messuages, lands, &c., within such borough, to any county rate thereafter to be made, but every part of such borough shall thenceforward be wholly free from contributing otherwise than is hereafter provided to any rate or assessment of any kind for the county in which any part of such borough is situated.

By s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money

1875

THE QUEEN v. NEW WINDSOR.

the boundaries of the municipal borough of New Windsor were made co-extensive with those of the parliamentary borough, the borough of New Windsor thenceforth consisting for all purposes of the parish of New Windsor, and a part of the parish of Clewer, both of which had never been liable to the county rate, together with a further portion of the parish of Clewer, which up to that time had been liable. From the passing of this Act in 1836, down to 1870, the borough of New Windsor regularly paid accounts sent in by the county treasurer under 5 & 6 Wm. 4, c. 76, s. 117 (commonly called "the other purposes account"), but in 1871 the town council refused payment, denying their liability, and had since paid nothing.

In June, 1875, an application was made by the county treasurer to the justices to hear a complaint and summons calling upon the treasurer of the borough to shew cause why a warrant of distress should not be granted against the borough to enforce payment, and was refused.

H. Matthews, Q.C., shewed cause. The question is, whether New Windsor is a borough within the exception in 5 & 6 Wm. 4, c. 76, s. 117, and liable to contribute, to the extent specified in that section, to the county rate. To establish this liability, it must be shewn to be a borough which, before the passing of the Boundaries Act, 2 & 3 Wm. 4, c. 64, was liable to contribute in whole or in part to the rate. Before the passing of the Boundaries Act the

expended out of the county rate for other purposes than the costs arising out of the prosecution, &c., of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests, and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed, upon such borough as the same shall be bounded according to the provisions of this Act, and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund.

borough was wholly exempt from the rate. But it is said that, as the borough, since the Municipal Corporations Act, includes a part of the county, which, before the passing of the Boundaries Act, was liable to contribute, therefore the whole borough is liable. But New Windsor did not become a borough in the municipal sense until the passing of 5 & 6 Wm. 4, c. 76, and it is therefore within the exception, for the borough was not chargeable to the county rate before the Boundaries Act.

[BLACKBURN, J. You omit the words "in whole or in part." One part of that which is now the borough was, before the Boundaries Act, liable to contribute, although it was not then part of the borough.]

The second part of Clewer which has been added to the borough is now liable to the borough and general district rates. On the other hand, there is no power to levy upon this part of the parish exclusively the contribution which the borough is required to make to the county rate. The result is that, if the construction contended for by the opposite side is right, the old borough becomes liable to an impost, from which it was always exempt. And though it may be replied that there is an addition to the borough rate, that will only meet the extra expenses for lighting and watching. *Reg.* v. *New Sarum* (1) does not bear out the proposition for which it is quoted in Chitty's Statutes, 3rd ed., vol. 1, p. 1016. It is there stated to have been held that a borough which was not, before the Boundary Act, liable to the county rate, cannot be called upon to contribute in consequence of part of the adjoining county being added to the borough by the Boundary Act. But in a note to the report, it is stated that Patteson, J., referred to Rawlinson's edition of the Municipal Corporation Act, p. 207, note, where an opinion is expressed that the law is clearly against the liability of the borough in such a case, for there is no provision for a separate rate being made on the added part only. The facts in *Reg.* v. *New Sarum* (1) were very like those in the present case, and although the reasons of the decision do not apply to the present case, the Court rely upon s. 112, as shewing that the liability to county rates which is there taken away, can only be kept alive by express words.

(1) 7 Q. B. 941, 948; 15 L. J. (M.C.) 15.

1875

THE QUEEN v. NEW WINDSOR.

[BLACKBURN, J. Can it be supposed, unless the language of the legislature is very clear, that they meant, without any compensation, to take from the county part of its taxable area?]

The principal county expenses will fall on the borough rate. The words of s. 117 are not "any part of a borough as now constituted," but "borough before the passing of the Boundaries Act."

Dowdeswell, Q.C. (*Greene* with him), in support of the rule. Before the passing of the Boundary and the Municipal Corporation Acts land within a borough the charter of which had no non-intromittant clause was assessed in the ordinary way to the county rate, but it was not a rate which could be made on the borough in its corporate capacity, but only upon the site and area of the borough, like any other property. Where there was a non-intromittant clause the jurisdiction of the magistrates was excluded, and it was not competent for them to impose a rate.

[BLACKBURN, J. Was that the case in a borough like Liverpool, where there was no such clause?]

Yes; the Lancashire county rate would be assessed on each ratepayer in Liverpool. The fallacy of the argument on the other side is in the use of the word "borough" as "borough proper," and not as "area of borough."

[BLACKBURN, J. In the case of a parish, were the parish officers directed to levy a particular sum, or was it levied generally as the county rate?]

The parish officials were directed to raise a particular sum, and they did it by levying a separate county rate.

[BLACKBURN, J. Then, in the case of a municipal corporation with no non-intromittant clause, why did not the corporation do exactly the same thing?

FIELD, J. *Bates* v. *Winstanley* (1) decided that, where part of a parish was added to a borough with a non-intromittant clause, and in the additional charter there was no such clause, the justices might assess and levy the rate within that part.]

The Act in force relating to the county rate at the time of the Municipal Corporation Act was 12 Geo. 2, c. 29. By s. 2, in the case of parishes the overseers are to pay the rate out of the poor-rate. By s. 3, where there are no poor-rates, the justices are to

(1) 4 M. & S. 429.

direct the assessment to be levied by the petty constables of the parish, township, or place, like a poor-rate. The borough, as such, never paid it. Before the Municipal Corporation Act there were no borough rates, properly so called. The only rating power was under particular charters, or local Acts. There is no hardship in making a borough to which part is added liable to the county rate. The county rate, so far as it is levied for "other purposes," is as much for the benefit of the borough as the county.

[FIELD, J., referred to *Reg.* v. *Birmingham* (1), where it was held that a new borough created under 7 Wm. 4 & 1 Vict. c. 78, with a separate court of quarter sessions, was liable to contribute to the cost of purchasing a county gaol, as this was not an expense incurred for the prosecution, &c. of offenders.]

That was on the ground that the area of Birmingham had previously been liable.

COCKBURN, C.J. I am of opinion that the rule should be made absolute. It seems difficult to suppose that the legislature, having in s. 117 of the Municipal Corporation Act expressly provided that, where a borough which had existed before the passing of that Act had either the whole or part of its area liable to the county rate, the liability to contribute in respect of such area or part of it should remain, could have intended to apply this principle to boroughs previously existing, and not apply it to boroughs which it for the first time called into existence, or which might be called into existence thereafter: for, in point of justice and expediency, the same rule ought to apply to one set of boroughs as to the other. I might have entertained, and did for some time entertain, some little doubt as to whether the language of the section is quite sufficient to embrace the case of a borough a portion of the area of which was added for the first time by the Municipal Acts; but the case of *Reg.* v. *Birmingham* (1) seems to me to establish by authority that which is only consonant with expediency.

BLACKBURN, J. I also think the rule should be made absolute. The question turns upon what is the true construction of

(1) 10 Q. B. 116; 17 L. J. (M.C.) 56.

1875

THE QUEEN v. NEW WINDSOR.

5 & 6 Wm. 4, c. 76, s. 117, and in order to understand the section it is essential that we should know what was the state of law which the legislature were altering. Now I think it is pretty clear that the county-rate was then leviable under 12 Geo. 2, c. 29, with some modifications and alterations which we need not take into account. It enabled the county justices to levy the rate, and the manner in which this was to be done was that the high constable was to levy it from the respective landlords. Then came several sections stating how this was to be done; and then a provision that where the poor-rate was levied the parish officers were to levy the county rate as a poor-rate, and in cases where there was no poor-rate the petty constable was to levy it in the same way. Therefore every place in a county, and forming part of it, was liable, unless there happened to be an exception, or where there happened to be a borough with a non-intromittant clause. The county justices had no jurisdiction in such a borough; and as the rate was to be made by the county justices, the consequence was that, for a reason which does not in practice strike one as very good, but which became established, the borough was exempt from the county-rate, and it could not be levied in such a borough, not for the reason that the borough did not get the full benefit of the county-rate, but that the county justices having no jurisdiction there, it could not be levied. Now this being the state of things, there being a vested interest in certain portions of territory not to pay the county-rate, there came the Boundary Act, which for parliamentary purposes added to the boundaries of different boroughs. Then the Municipal Corporation Act says the municipal boundary shall be the same as the parliamentary, and shall include the added districts. Now comes the direction as to the county-rate. By ss. 113, 114, a borough which has got a court of quarter sessions granted to it is to bear the expenses of its own prisoners, the prisoners which come from the district and area within it, including the new bit which is added to it as well as the old. These expenses are all to be borne by the borough itself. When expenses are incurred at assizes, the treasurer of the county first disburses them, but he has to keep a separate account of them and send it to the borough with his precept, and the borough has to pay that portion, so that it bears all the expenses

of the prisoners who come from within its ambit, whether from the old bit of the county which is the new bit of the borough or not. But s. 112 says a "borough which is incorporated under this Act, and has got a court of quarter sessions, shall bear no part of the county-rate except as hereinafter mentioned." Then comes s. 117, and it begins by saying that "the treasurer shall keep an account of all sums of money expended out of the county-rate for other purposes than the costs arising out of the prosecution, maintenance and punishment, conveyance and transport, of all offenders committed for trial to the assizes in such county." Then it says, that as to these expenses, he shall send to any borough which before the passing of the Boundary Act was chargeable with or liable to contribute in whole or in part to the county-rate of the county, "and shall make an order for the payment of such proportion of such expenses as would have been chargeable after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not been passed, upon such borough, as the same shall be bounded according to the provisions of this Act, and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund." Now, looking at these words, Mr. Matthews argued as if there were cases under the County Rates Act, as it before existed, in which the charge was made on the borough in its capacity of borough; and the mode of levying the rate was to send a precept to the borough, and say, "Do you, the municipal corporation of this borough, within your limits, levy this sum, and send it over to us." If this had been the case, there would have been great force in the argument that the words "borough liable" meant "borough liable in its corporate capacity." But there is no such thing that I can find in the County Rates Act (12 Geo. 2, c. 29). Therefore, when s. 117 of 5 & 6 Wm. 4, c. 76, speaks of a borough which was in whole or in part liable, I think it must mean a borough the area of which was all or partly liable to contribute to the county rate, and that in such a case the county-rate shall not for all purposes be taken away. At first I was struck with the apparent injustice of this, as saying that the county is to be relieved of its expenditure, but is to keep all the

1875

THE QUEEN v. NEW WINDSOR.

gain; but when we look at it, this is not the case. The county rate is relieved of expenditure; is relieved of expenditure, indeed, so far as the expense of criminal prosecutions arising out of this district in Clewer—this bit of the county newly added to the borough; as far as that is concerned, the county is relieved from it. This is true; but then the county does not retain the revenue, and cannot make charges against this district in respect of criminal prosecutions which do not arise from the borough; it only gets a proportion of the charges for other purposes than the costs arising from criminal proceedings. The criminals from other portions of Berkshire are not to be charged to the county rate for New Windsor at all. It is only the expenses of Berkshire other than the criminal expenses that are to be charged; when once one sees that, it is quite fair and just. The county is deprived of its jurisdiction over this district; it is also relieved from the expenses of this district in part; but it still does, for the benefit of this district, expend the other parts of its county rate, and those expenses not proceeding from criminal prosecutions in the county ought to be as they were before. *Reg.* v. *Birmingham* (1) is in point. There the district of Birmingham, which had not been incorporated as a borough at all before 1839,—in 1838 there was an abortive attempt to make it a borough, but it seems to have fallen through,—in 1839 was incorporated as a borough. Finally it obtained a grant of a separate court of quarter sessions, and the Municipal Corporations Act, s. 112, was extended to it. Then came the question with regard to the portion of Warwickshire which was being turned into the borough of Birmingham, but which was not the borough of Birmingham before,—shall it or shall it not be liable to contribute to a portion of the county-rate of Warwickshire, which was for the building of a gaol? The Court of Queen's Bench said, This building or purchasing of the gaol is not an expense referring to the prosecution of criminal proceedings in the county of Warwick and within the exception, and therefore a proportion is chargeable under s. 117, or a proportion of it is chargeable to that portion of the county of Warwick which was liable to contribute to the county-rate before, which has now become the borough of Birmingham, and therefore

(1) 10 Q. B. 116; 17 L. J. (M.C.) 56.

1875

THE QUEEN v. NEW WINDSOR.

is not directly liable, but has to raise a sum and pay it over. This seems to be just legislation, and consequently I think this rule should be made absolute.

FIELD, J., concurred.

Rule absolute.

Solicitors for prosecution: *Newman, Stretton, & Hilliard, for Morland & Son, Abingdon.*

Solicitor for defendants: *Lott, for Darvill, Windsor.*

GERY *v.* REDMAN.

Dec. 15.

Evidence—Presumption as to Ownership of Land by Side of Highway—Admission against Interest—Inclosure Act.

In 1818 R. inclosed a piece of land of 11 perches, lying by the side of a lane which was a highway, in the manor of W. At that time G. was the owner in fee of the adjoining freehold land. In 1820 G. died, having devised his estates to H. W. G. for life, with remainders over. In 1836 a private Act was passed, by which commissioners were empowered to inclose and allot the wastes of the manor, including encroachments made within twenty years of the passing of the Act, and pieces of waste land lying by the sides of any public roads or lanes. In 1837 R. died, and W. F. R., his heir, took possession of the 11 perches. In 1838 the commissioners made and published their award, by which they awarded to H. W. G. two allotments, one of 24 perches, which included the 11 perches, and another of 29 perches similarly situate. H. W. G. took possession of the second allotment; but W. F. R. remained in possession of the piece of 11 perches, till he sold it, in 1859, to the defendant. In 1874 H. W. G. died, and the plaintiff succeeded to the estate under the will of G. He then brought ejectment against the defendant to recover the 11 perches:—

Held, that the admission of H. W. G. against his interest, by accepting the allotment under the award, was strong evidence that the land was waste of the manor, and rebutted the presumption arising from the situation of the slips of land, that they belonged to him as owner of the adjoining land. That, consequently, the plaintiff's right of entry commenced from the time of the award, when there was a tenancy for life, and not from 1818; and, therefore, the Statute of Limitations had not run against the plaintiff, and he was entitled to recover.

APPEAL from the county court of Bedfordshire holden at Bedford.

1. This was an action of ejectment to recover possession of a small piece of land situate at Wootton, in the county of Bedford.

2. The following are the particulars of the premises sought to

1875

GERY v. REDMAN.

be recovered, as annexed to the summons: All that piece of land situate at Keeley Green, in the parish of Wootton, in the county of Bedford, containing 11½ perches, or thereabouts, being the western part of an allotment containing 24 perches, awarded by the commissioners, acting on the inclosure of Wootton aforesaid in 1838, to the Rev. Hugh Wade Gery, now deceased, and now belonging to the plaintiff; which said plot of land is bounded on the north by Keeley Lane aforesaid, on the east by other part of the said allotment of 24 perches, on the south by an ancient inclosure, late of the said Rev. Hugh Wade Gery, but now belonging to the plaintiff, and on the west by property of the defendant.

3. The following facts were either proved or admitted at the trial: In the year 1818 Charles Gery was the owner in fee of a freehold estate at Wootton, situate near to and in part abutting upon a lane called Keeley Lane. Between one of the fields of this estate and the part of the lane which was used for public traffic, there was a piece of waste land containing about 24 perches; and in the year 1818 James Redman took possession of part of this waste land to the extent of 11½ perches, and inclosed it with a fence, and having made a sawpit thereon, used it for the purpose of a timber yard. This piece of land forms the subject of the present action.

4. No evidence was produced to shew that Charles Gery took steps to eject James Redman, who continued to occupy the piece of land down to the time of his death in 1837.

5. Charles Gery died in 1820, and by his will devised his lands and estates at Wootton to trustees to the use of his wife for life, and after her death to the use of his great-nephew Hugh Wade Gery, for life, and after his death to the sons and daughters of Hugh Wade Gery in succession in tail, and failing them to his great-nephew Thomas for life, with remainder to his issue in tail, and in default to the plaintiff for life, with divers remainders over.

6. On the 13th of March, 1836, a private Act (6 Wm. 4, c. 2) was passed for inclosing certain commons and waste lands in the parish of Wootton.

7. By s. 1 the commissioners therein named were appointed for setting out, allotting, and inclosing the open fields, commons,

commonable and waste lands, and grounds in the said parish of Wootton.

8. By s. 15: "If any dispute or difference shall arise between any of the parties who now are, or before the execution of the award of the said commissioners, may be, interested in the said intended division and allotment, touching any claim or claims, rights, or interests in the said lands to be divided and inclosed or allotted by virtue of this Act, or any other matter or thing relating to the said intended division, inclosure, or allotment, it shall be lawful for the said commissioners, and they are hereby required, upon examination of witnesses upon oath or of any other proper evidence, to inquire into, hear, and determine the same: Provided always that nothing herein contained shall authorize or empower the said commissioners to determine the title to any lands, tenements, or hereditaments whatsoever, nor to determine any right between any of the parties contrary to the possession of such parties, except in cases of encroachment, as hereinafter mentioned; but in case the said commissioners shall be of opinion against the right of the party so in possession, they shall forbear to make any determination thereupon until the possession shall have been given up by such parties or recovered from such parties by ejectment or other due course of law."

9. By s. 32, it is enacted "that all encroachments or inclosures taken or made from or on any part of the said lands hereby directed to be divided, inclosed, or allotted within twenty years next before the passing of this Act (30th of March, 1836), ... shall be deemed part and parcel of the lands thereby directed to be inclosed or allotted; and in case any dispute arise as to any encroachments, or inclosures, or the duration thereof, such dispute shall be settled and determined by the said commissioners."

10. By s. 49, the commissioners were directed to divide and allot the residue and remainder of the said lands and grounds (after certain allotments to the lord of the manor and the rector of the parish), unto and amongst the several persons and bodies who should at the time of making such allotments be entitled to any estate, right, or interest therein.

11. By s. 53, it is enacted: "that all pieces and small parcels of uninclosed waste lands lying by the side or sides of any public

1875

GERY v. REDMAN.

roads or lanes within the said parish of Wootton, which, in the judgment of the commissioners, might be conveniently inclosed without incommoding the public intercourse on such roads or lanes, or rendering such roads of less breadth than thirty feet respectively; and which, if this Act had not been passed, would have been vested in the lord of the manor, shall be deemed part of the lands or grounds intended to be divided, allotted, and inclosed under or by virtue of this Act.

12. By s. 60, it was enacted that the several allotments should, within six calendar months from the signing of the award, be inclosed and fenced, and the hedges, ditches, and fences made in such manner as the commissioners should direct, and the fences of such allotments as should join any private or public road or way should be guarded with good and substantial fences and rails.

13. By s. 76, it is enacted that nothing in this Act shall revoke, annul, make void, alter, vary, or in any way affect any deed or will whatsoever, or prejudice any persons having any claim or demand, affect any of the lands or grounds directed to be divided, inclosed, or allotted, or any of the messuages, lands, or tenements which should be exchanged or parted with in pursuance of this Act, "but that as well the lands allotted or exchanged as the hereditaments which shall be assigned in partition or in compensation for any other estate or right by virtue of this Act, shall immediately after such allotment, exchange, partition, or assignment remain and enure, and the several persons to whom the same shall be allotted, assigned, or given in exchange or on partition as aforesaid, shall thenceforth stand and be seised and possessed thereof respectively, to, for, and upon such and the same uses, estates, intents, trusts, and purposes respectively, and subject and liable to such and the same wills, settlements, limitations, remainders, conditions, charges, and incumbrances, in all respects as the several lands, tenements, and hereditaments in respect whereof such allotments, inclosures, partitions, and assignments shall have been made, should or would have been severally limited, settled, vested, or subject, or liable to, or been held by, in case the same had not been allotted, exchanged, or parted with as aforesaid and this Act had not been passed." . . .

There are also provisions in the Act for securing a right of

appeal to any person aggrieved by the commissioners' decision. See ss. 15, 17, 32, 59, and 82.

14. At the time of passing this Act, Hugh Wade Gery was tenant for life in possession of the said estate at Wootton, and James Redman was in possession of the said piece of land lying between the said estate and the land as hereinbefore described.

15. In February, 1837, James Redman died intestate, leaving William Frederick Redman, his eldest son and heir-at-law surviving, who took possession of and continued to occupy the said piece of land, as James Redman had done since the year 1818.

16. The commissioners appointed by the Act duly made their award, dated the 23rd of May, 1838, whereby, after allotting certain of the waste land to Joseph Francis Oackworth, the then lord of the manor of Wootton, and to the rector of the parish, they awarded as follows: And we the said commissioners, have appointed, divided, set out, and allotted, and by these presents do award and confirm all the residue and remainder of the lands and grounds by the said first-mentioned Act directed or authorized to be divided and inclosed or allotted unto and amongst the several persons and bodies politic, corporate, and collegiate entitled to any estate or interest therein in quantities, shares, proportions, and situations hereinafter mentioned, the request and consent in writing of the respective proprietors of the several anciently inclosed lands intended to be hereby allotted and considered as allottable lands, having been first duly made and given in that behalf according to the directions of the said Act (that is to say) . . . . Unto and for the Rev. Hugh Wade Gery, clerk, the three (sic) following allotments or parcels of land, viz., one allotment or parcel of land being part of the waste at Keeley Green, containing 24 perches, bounded on the north by Keeley Lane, on the south by an ancient inclosure of the said Hugh Wade Gery, and on the west by an allotment to the heir or devisees of James Redman, deceased. The fence for inclosing the last described allotment next the said lane, shall be made and for ever after maintained and supported by and at the expense of the owners of the same allotment for the time being. One other allotment or parcel of land on Keeley Green, containing 29 perches, bounded on the north by Keeley Lane, on the east by an allotment to and

1875

GERY v. REDMAN.

ancient inclosures of William Brigg, and on the south by the farm homestead of the said Hugh Wade Gery. The fence for inclosing the last-described allotment next the said lane, shall be made and for ever after maintained and supported by, and at the expense of the owners of the same allotment for the time being; which said allotments we do adjudge and determine to be in lieu and full satisfaction of his rights of common over the open and common fields, &c.

17. The said first-mentioned allotment describes the land in question in this action, and Mr. Charles Day, the surveyor under the Act, being examined on the part of the plaintiff, stated that he inspected this piece of land at the time of making the plan for the award, and that it was an encroachment by Redman from the waste, not twenty years old; and that he inquired into encroachments by the direction of the commissioners. The award was duly made and published, and Hugh Wade Gery took possession of the last-mentioned allotment; but no evidence was produced to shew that any fence between the said piece of land and Keeley Lane was made or maintained by him, or his successors in title, as directed by the private Act.

18. After the publication of the award William Frederick Redman remained in possession of the said piece of land, as the same had been fenced as before-mentioned by James Redman, until the year 1859, when he sold and conveyed the piece of land to the defendant; and the defendant entered into, and has continued, and still is in possession thereof.

19. On the 25th of March, 1871, Peter Purves, as agent for Hugh Wade Gery, gave notice to the defendant to quit the piece of land, but the defendant disputed the title of Hugh Wade Gery, and no proceedings were then taken to eject the defendant.

20. On the 7th of March, 1874, Hugh Wade Gery died without leaving issue, and the plaintiff became entitled to the said estate at Wootton as tenant for life in remainder under the limitations in the will of Charles Gery.

21. On the 20th of August, 1874, the plaintiff's attorneys wrote and sent to the defendant's attorney a letter, demanding possession of the piece of land.

The defendant eventually refused to give up possession of

the land, and shortly afterwards the present action was commenced.

22. There was no evidence of any payment of rent or acknowledgment by the defendant or his predecessors since the year 1818.

23. It was proved that the various owners of land abutting on the said Keeley Lane had from time to time inclosed pieces of waste land similarly situate and near to the land in question, and lying between their said lands and the portion of the said lane used for public traffic.

24. There was no evidence of any acts of ownership by the lord of the manor over the land in question, nor any other evidence to shew that the land in question had ever belonged to the lord of the manor, except that the commissioners, by their award, in terms allotted the said piece of land as aforesaid as "part of the waste land at Keeley Green," and that the lord of the manor received an allotment of one-eighteenth part of the waste lands in the parish in extinguishment of his manorial rights. And that the allotments made to the Rev. Hugh Wade Gery were expressed to be made in lieu and satisfaction of his rights of common over the open and commonable lands directed by the said Act to be inclosed and allotted.

25. It was admitted that as the testator Charles Gery was living in 1818 and was then the owner in fee of the said adjoining estate, if the piece of land in question then belonged to him, the Statute of Limitations began to run from that period as against him and those claiming under him. But it was contended on behalf of the plaintiff that the piece of land in question did not, as a matter of fact, in 1818, belong to Charles Gery, but to the lord of the manor; and that even if it did, by interpretation of law, belong to Charles Gery, the running of the statute ceased upon the allotment of this piece of land by the commissioners to the Rev. Hugh Wade Gery, in whom, as tenant for life, it became vested by that allotment, and under s. 32, freed from the previous encroachment, which was proved to have been inquired into by the said commissioners, and no new encroachment, however good against him as such tenant for life, could affect the rights of the plaintiff his successor in title.

On the part of the defendant it was contended that the piece of land in question being waste land lying between Keeley Lane and

1875

GERY v. REDMAN.

the Gery estate, the presumption in law was, that it belonged to Charles Gery as the adjoining owner, and that there was no sufficient evidence that the said land was vested in the lord of the manor at the time of the passing the Act and the making of the award; and that the award was not sufficient to rebut the presumption of law; and therefore that the plaintiff's title, if any, was derived from the will of Charles Gery, and not under the award; and, secondly, that the allotment by the Inclosure Commissioners being made to Hugh Wade Gery, it was not shewn that the said land was allotted to him in lieu of commonable or waste land or commonable rights to which he was entitled under the will of Charles Gery, and therefore the claim of the plaintiff was barred by the Statute of Limitations.

26. The judge overruled both these objections, and gave judgment in favour of the plaintiff.

The question for the opinion of the Court is, whether under the circumstances above stated the judgment was right in point of law.

Bosanquet, for the defendants. The question is, to whom did this slip of 11 perches of land belong in 1818, when the defendant's predecessor inclosed it? The presumption in such cases is, that the open pieces by the side of the public highway belong to the owner of the adjoining inclosed land between which and the highway the pieces lie. This presumption no doubt may be rebutted: see *Grose* v. *West* (1); *Steel* v. *Prickett* (2); *Simpson* v. *Dendy*. (3) But here there is nothing to rebut the presumption; on the contrary, it is found in the case that the owners of the adjoining land had inclosed waste land similarly situate. The award of the commissioners cannot affect the title. They had only jurisdiction to deal with and allot the waste of the manor; and therefore, if Charles Gery was the owner, the award had no effect upon his title.

[BLACKBURN, J. But if it had belonged to Charles Gery, why should Hugh Wade Gery acquiesce in the award, by which he admitted that he was not the owner?]

The conduct of Hugh Wade Gery was purely negative: he seems to have taken no part one way or the other, but left Redman in undisturbed possession.

(1) 7 Taunt. 39, (2) 2 Stark. 463, (3) 8 C. B. (N.S.) 433.

A. Charles, for the plaintiff. The land belonged in 1818 to the lord of the manor. The presumption that it belonged to Gery as owner of the adjoining land is rebutted by the award, which is at least strong evidence of the fact, if not conclusive. Sect. 35 of 40 Geo. 3, c. 107, would seem to make the award conclusive: *Bateman* v. *Boynton*. (1) But, at all events, as has been pointed out from the Bench, there is a piece of evidence quite sufficient to outweigh the presumption in favour of the Gery title, viz., the admission by H. W. Gery against interest. For, although it must be admitted that the "last-mentioned allotment" in paragraph 17 of the case, of which H. W. Gery took possession, must be taken to mean the 29 perches (and not the 24, which included the 11 perches in question); still, as H. W. Gery acquiesced in the award and took possession of one allotment, it is an admission on his part that the pieces by the side of Keeley Lane were waste of the manor, and not part of his, Gery's, estate; and s. 53 of the Inclosure Act says expressly that these pieces shall be allotted.

Bosanquet, in reply. Redman had been twenty years in possession in 1838, and his title was therefore complete at the time.

[BLACKBURN, J. No; s. 32 of the Act prevents that, by saying that, in the case of encroachments not twenty years old at the passing of the Act in 1836, they shall be within the commissioners' jurisdiction.]

That is, if they are encroachments on the wastes of the manor; but that is the question to be decided; and if this piece belonged to H. W. Gery, then there was no admission against interest by him, for Redman's title as against him was complete.

BLACKBURN, J. I am of opinion that our judgment should be for the plaintiff, affirming the judgment of the county court judge. The case in parts is by no means clearly stated, but I think there is enough to shew that the judge's conclusion was right in point of fact.

It appears that in 1818 there was, in the parish and manor of Wootton a lane, called Keeley Lane, and along the sides of this lane were strips or open pieces of ground, and beyond them old inclosures, and some of the inclosures belonged to Charles Gery.

(1) Law Rep. 1 Ch. 359.

1875

GERY v. REDMAN.

Whether these strips were part of the waste of the manor, or whether they belonged to the owners of the adjoining inclosed land, amongst others to Charles Gery, is a question on which a good deal turns. But it seems that in 1818 these strips of land must either have belonged to the lord of the manor as part of the wastes of the manor, or they were part of the property of Charles Gery; it is not disputed that the strip in question did not belong to Redman. But in 1818 Redman did inclose 11 perches of this open ground, and in doing this he may have been licensed, but probably it was a mere encroachment, and he either took the waste of the lord, or the land of Charles Gery. In 1820 Charles Gery died, having made a settlement of his property by will; and as to the land in question, if his, it is to be observed that he had then been put to his right of entry, because Redman had been in possession two years; and if the land then belonged to Gery, the Statute of Limitations would run from that time, and no subsequent settlement of the property would have any effect to prevent it running. But if the ground belonged to the lord of the manor, he would have had the right to enter and turn out Redman up to 1838. In 1836 the Inclosure Act passed, with powers to the commissioners to allot the waste lands and commons of the manor, but not any other open land; and they had no power, as it appears to me, to decide title; but in the case of encroachments less than twenty years old, if they were part of the waste, the commissioners were to treat them as they would the open waste, and as the piece of ground in question had not been inclosed twenty years, they were not precluded from allotting that; and on making inquiry, the commissioners seem to have thought that it was part of the waste of the manor, or land which they had a right to inclose. At all events they assumed it to be part of the waste, and made an allotment of it, together with other land, to Hugh Wade Gery; the two allotments being one of 24 perches, including the 11 perches in question as a new encroachment, and the other of 29 perches. Now, on the question whether the pieces of land belonged to the lord or to Gery, the presumption on either side seems pretty evenly balanced. On the one hand there was what the commissioners did, treating the land as waste of the manor, after inquiry; on the other, was the evidence, which would make against the claim of the lord, that various owners of land

abutting on Keeley Lane had inclosed at different times land similarly situate, adjoining their own property. But that is not very strong evidence, when we consider how frequently encroachments are made on commons by neighbouring landowners. But then we have this piece of evidence. At the time of the allotment, Hugh Wade Gery was tenant for life of the Gery property, under Charles Gery's will, and of course he had an interest in making the will extend as far as possible, and he had an interest in denying that the commissioners had any power over this open land, and to claim it as belonging to himself. Instead, however, of doing this, he accepts the award and takes one of the allotments, at all events, under it. That is a very strong piece of evidence, an admission by a deceased person against interest which is evidence against all persons. This admission was made when the twenty years had nearly run in favour of Redman if the land belonged to Gery, whereas if it had belonged to the lord of the manor, Redman's title would not be complete for twenty years from the date of the award; and it was argued that Gery's admission was therefore not against his interest. But in 1836, when the Act passed, Redman's title was not complete, and so the admission was really against Gery's interest; and was certainly against his interest with regard to the rest of the land contained in the award. Taken altogether, therefore, this admission against interest was a strong piece of evidence to shew that all these pieces of land belonged to the waste of the manor; and therefore, as it seems to me, the balance of evidence is turned, and the preponderating weight of evidence is that these eleven perches were part of the lands which the commissioners had a right to inclose. The time, therefore, would begin to run from after the date of the award in 1838, and there being at that time a tenancy for life, which lapsed in 1874, the time has not run, and the plaintiff brought his action in plenty of time.

On these grounds I think the decision of the county court judge should be affirmed.

QUAIN, J. I am of the same opinion. Sect. 53 of the Act of Parliament seems to apply to this very thing, for it enacts that the pieces of land lying by the sides of the public roads and lanes in the parish of Wootton should be deemed part of the

1875

GERY v. REDMAN.

lands to be inclosed if they were waste of the manor. This shews that the framers of the Act contemplated that there were pieces of land situate like those on the side of Keeley Lane which belonged to the lord of the manor. The question then is, was the piece in question part of the waste of the manor, or did it belong to Gery? Primâ facie open pieces of land by the sides of a highway belong to the owner of the adjoining land, and it appears by paragraph 21 that other adjoining owners had inclosed land along the sides of this lane. On the other hand, the Act expressly contemplates that inclosures had been made of land not belonging to the owners but to the lord of the manor; for it enacts by s. 32 that encroachments not twenty years old in 1836 shall be deemed part of the waste lands to be allotted.

Now in 1836 Redman's title by possession was not complete, and the land admittedly belonged either to the lord or to Gery; the defendant says it belonged to Charles Gery, and in that sense he claims under him. If it belonged to the lord, s. 32 prevents the title from being acquired after the Act passed, as it expressly gives the commissioners power to deal with and allot such encroachments just as if they were open wastes of the manor; and the commissioners after inquiry deal with the land as waste of the manor. Granted, if the land were part of the Gery property, the commissioners had no power over it; but then there is this important fact, that the then tenant for life of the Gery property acquiesces in the commissioners dealing with it, and accepts their award giving him two allotments; thus in the strongest manner making an admission against interest that the land did not belong to him but to the lord of the manor.

On the whole, therefore, I think the preponderance of evidence was in favour of the plaintiff, and the county court judge was right.

ARCHIBALD, J. I also think that there was evidence to support the county court judge's decision. The question is, whether the land was part of the waste of the manor, or whether it belonged to the Gery estate. The presumption from its situation is that it belonged to Gery, the owner of the adjoining inclosed lands; but this presumption may be rebutted by evidence. Now the commissioners, acting under ss. 32 and 53, deal with it as part of

the waste subject to their jurisdiction, and allot it and another piece to H. W. Gery, the then tenant for life. He acts against his interest in taking possession, thereby admitting that the land was not his, but part of the waste of the manor. If that be so, then the defendant could only claim adversely to H. W. Gery from the date of the award; and the plaintiff has commenced his action in time.

Judgment for the plaintiff.

Solicitor for plaintiffs: *E. V. Cross.*
Solicitor for defendant: *Stimson.*

THE QUEEN, ON THE PROSECUTION OF J. F. HARRISON, *v.* MEYER AND OTHERS, JUSTICES OF MIDDLESEX.

Dec. 17.

Justices of the Peace—Interested Justice—Certiorari—Costs on Rule against Justices.

H., the owner of a farm in the parish of Edmonton, bounded by the river Lee, entered into an agreement with the Enfield Local Board of Health, under which H. received the sewage of the Enfield district, and disposed of it over his farm. After a few months disagreements arose, and the Enfield Board took legal proceedings against H. to enforce the agreement. While these were still pending, H., after notice given to the board, diverted the sewage from his farm through a pipe into the old open channel or watercourse in the parish of Edmonton, through which the sewage had been used to flow into the river Lee. On this the Edmonton Local Board of Health threatened proceedings against the Enfield Board for the nuisance; and the Lee Conservancy took out summonses under their Act against H. for having opened the pipe into the channel, &c., and for continuing the use of it. On the summonses coming on for hearing, M., who was the chairman of the Enfield Local Board, and had taken an active part in its proceedings, sat with three other justices on the bench. H. objected to M. sitting as a justice, but he remained; and H. was convicted in penalties. A rule for a certiorari was then obtained for the purpose of quashing the convictions on the ground that M. was an interested justice. On shewing cause M. made affidavit that, though he sat on the bench, he took no part until the other justices had unanimously determined to convict H., when he, M., proposed a mitigation of the penalties, and that he did not sign the convictions:—

Held, that M. had such an interest as might give him a real bias in the matter; consequently he ought not to have sat as a justice, and it was immaterial what part he really took in the matter; and the Court made the rule absolute with costs against M.

RULE calling upon James Meyer and three others, justices of Middlesex, to shew cause why a writ of certiorari should not issue

1875

THE QUEEN v. MEYER.

to remove into this Court certain convictions by them of James Fortescue Harrison.

The ground of the rule was that one or more of the justices were interested in the matter of the convictions.

The following is a summary of the facts appearing in the affidavits on which the rule was granted:—

Harrison was the owner of a farm of 163 acres in the parish of Edmonton. On the 26th of August, 1870, Harrison entered into an agreement in writing, whereby he agreed under certain conditions to receive upon his farm from the Enfield Local Board of Health, the sewage of the parish of Enfield (which sewage had for years prior to the 31st of July, 1868, passed and flowed into a ditch or channel and thence into the river Lee), Harrison intending to utilize the sewage on his farm. The sewage was to be delivered by the Enfield Local Board, at a point in that parish near the farm.

For some few months the sewage was delivered to and made use of by Harrison; but in 1871, in consequence of differences which had arisen between Harrison and the Enfield Board, he turned the sewage off his land, and it then found its way into an intercepting drain under the jurisdiction of the Lee Conservancy Board, who are appointed under 31 & 32 Vict. c. cliv., "An Act to make provision for the preservation and improvement of the river Lee and its tributaries," and have power to proceed by way of summary conviction of persons offending against the enactments of the statute.

After Harrison had turned the sewage off his farm, the Lee Conservancy Board took proceedings against the Enfield Local Board before justices for a breach of the provisions of this Act, and a conviction was obtained and a fine inflicted.

After this conviction Harrison again allowed the sewage to run on to his land, and be there absorbed. The surplus water had to find an outlet into the said intercepting channel, and it was alleged by the Lee Conservancy Board that it was not properly purified.

In July, 1872, the Enfield Local Board filed a bill in Chancery against Harrison, and applied for an injunction against him to restrain him from turning the sewage off his farm before it had

been properly purified and rendered fit to flow into the river Lee. In March, 1874, the bill was dismissed by the Master of the Rolls, with costs against the plaintiffs.

The Enfield Board then commenced proceedings at law against Harrison, which are still pending.

Towards the end of 1874 Harrison gave notice to the Enfield Board that he should decline, except on certain conditions, to take any more sewage on his farm, and after sufficient time had elapsed for the board to have made fresh arrangements, in December, 1874, Harrison directed that the sewage should be turned into the channel in which it had flowed before he had begun to receive it. This channel or intercepting cut, runs through the parish of Edmonton, and is under the jurisdiction of the Lee Conservancy Board, and is an open watercourse or ditch.

After the sewage of the parish of Enfield had been restored to this its original channel, running through the parish of Edmonton, the Local Board of Edmonton called upon the Enfield Board to take measures to stop the nuisance caused thereby, and threatened to take proceedings against them.

On the 22nd of March, 1874, two summonses were issued on the complaint of the Lee Conservancy Board against Harrison, one for unlawfully making an opening into the intercepting drain, being a tributary of the river Lee, in order to provide for the flow of sewage; the other, for contravening s. 91 of the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), by opening into the said intercepting drain a pipe for the passage of the sewage.

A conference took place between the Enfield and Edmonton Boards, on the 23rd of March, the day after the summonses were issued; and inter alios Mr. James Meyer, chairman of the Enfield Board, and Mr. Henry Nash, chairman of the Edmonton Board, were present; and a statement was made by Meyer that proceedings had been taken against Harrison by the Lee Conservancy Board for the nuisance complained of by the Edmonton Board, and that the Enfield Board were also taking proceedings against Harrison to compel him to fulfil his contract to take the Enfield sewage. The conference resulted in the Edmonton Board agreeing not to take any steps against the Enfield Board until after the summonses against Harrison had been disposed of.

1875

THE QUEEN v. MEYER.

Two other summonses were afterwards taken out against Harrison by the Lee Conservancy Board for the continuance of the acts complained of in the other summonses.

The four summonses came on for hearing on the 19th of April, when Mr. Meyer and Mr. Nash were two of the four justices on the bench.

Harrison personally attended, and protested against Messrs. Meyer and Nash being on the bench, especially Mr. Meyer. They both remained on the bench, and after the cases had been heard the four justices retired to consider their judgment, and on their return into court the chairman announced that they had convicted Harrison on two out of the four informations. The convictions were in 10*l.* and 40*l.* respectively, the latter being at the rate of 10*s.* a day for eighty days for the continuance of the nuisance.

The affidavits also contained a statement that Meyer had a pecuniary interest in Harrison being compelled to take the Enfield sewage, as otherwise considerable expense must be incurred by the parish in getting rid of its sewage; and Meyer was a ratepayer to a considerable amount in Enfield parish.

The affidavits filed on shewing cause did not substantially alter the above facts. But Meyer swore that he did not act as chairman on the day in question, although he usually did so in the absence of the permanent chairman; that he did not directly or indirectly exercise any influence on the proceedings, except so far as to recommend, after the other justices had unanimously resolved to convict, a mitigation of the penalties to the above sums; and that he, Meyer, did not sign the convictions.

Besley, shewed cause. There was here no pecuniary interest in Mr. Meyer to make a disqualifying interest, moreover that disqualification is removed by 30 & 31 Vict. c. 115, s. 1.

[BLACKBURN, J. The disqualification is not confined to pecuniary interest. Mr. Meyer, as chairman of the Enfield Local Board of Health, was one of the litigant parties with Mr. Harrison.]

In *Reg.* v. *Rand* (1) a mere possibility of bias was held not

(1) Law Rep. 1 Q. B. 230.

sufficient to make the Court interfere. [He also referred to *Reg.* v. *Cheltenham* (1), and *Wakefield Local Board* v. *West Riding and Grimsby Ry. Co.* (2)]

Biron, in support of the rule, was not heard.

BLACKBURN, J. We are all of opinion that the rule must be made absolute. It is now said that Mr. Meyer, although he sat as one of the justices on the bench, took no part in the matter. We cannot go into that question. The question is, was he so interested in the matter as that he ought not to have sat? Formerly, any amount of pecuniary interest however small used ipso facto to disqualify a justice. But statutes have in a great many cases removed this disability. But the disqualification in the present instance is not on the ground of pecuniary interest. The question is, was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter? Now it is impossible to read Mr. Harrison's affidavit, which is really and substantially uncontradicted, without seeing that Mr. Meyer had such an interest. In the case of a justice having any pecuniary interest the Court was compelled to quash the conviction; but though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial. In *Reg.* v. *Rand* (3) we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not ipso facto avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying, "that we must not be understood to say, that where there is a real bias this Court would not interfere." In the present case there is such a real bias. Mr. Meyer was sitting as a judge in an information arising out of a matter in which he was a litigant party with the defendant; and although he states he took no part in the conviction, yet he

(1) 1 Q. B. 467. (2) Law Rep. 1 Q. B. 84.
(3) Law Rep. 1 Q. B. 230, 233.

1875

THE QUEEN v. MEYER.

clearly ought not to have been on the bench; and we have no doubt that the rule must be made absolute.

QUAIN and FIELD, JJ., concurred.

PER CURIAM:

Rule absolute with costs against Meyer. (1)

Solicitors for applicant: *J. Wood & Co.*
Solicitor for justices: *Pead.*

Dec. 17.

HOOPER AND OTHERS *v.* KEAY AND DRAPER.

Debtor and Creditor—Payments on Account, how to be appropriated.

13 C.L.D. 715

The plaintiffs supplied goods to K. & D., who were in partnership, and they gave plaintiffs their acceptance for 132*l.*, the amount. Before the bill was due K. & D. dissolved partnership, and gave notice to the plaintiffs with the intimation that K. would carry on the business, and would receive and pay the accounts due to and from the old firm. The plaintiffs continued to supply K. with goods, and he gave them his acceptance for the amount, and also paid them several sums on account, but without any specific appropriation. After some months the plaintiffs sent in their account to K., beginning on the debit side with the acceptance for 132*l.*, and, after giving him credit for the sums paid, shewing a balance against K. of 92*l.* After this K. paid the plaintiffs two other sums, which, with the sums already paid, amounted to more than 132*l.* Plaintiff having sued K. & D. on their acceptance for 132*l.*, D. pleaded payment:—

Held, that, the plaintiffs having sent in the statement to K. treating the whole as one account, the subsequent payments must be appropriated to the earlier items of the account; and consequently that the plea was proved.

DECLARATION, upon a bill of exchange dated the 16th of January, 1874, for 132*l.* 2*s.* 8*d.*, drawn by the plaintiffs to their own order, and accepted by the defendants, at four months, claiming a balance of 62*l.*

The defendant Keay let judgment go by default; and the defendant Draper pleaded payment.

Issue joined.

At the trial before Field, J., at the Middlesex sittings in Easter

(1) The granting of costs when a rule is made absolute for a certiorari is contrary to the usual practice: see Gray on Costs, p. 466, where it is said: "As there is no provision" (in the statute 5 Geo. 2, c. 19) "for the payment of costs where the order or other proceeding is quashed, neither party is in that case entitled to costs."

Term, 1875, it appeared in evidence that the defendants were in partnership at the date of the bill, and the plaintiffs had supplied goods to the partnership to the amount for which the acceptance was given.

The partnership was dissolved on the 2nd of March, 1874; and on that day the defendants wrote the following letter to the plaintiffs:—

"Stafford Works, Birmingham.

"We beg to inform you that the partnership between us has been this day dissolved by mutual consent. The business will from this date be carried on by our Mr. Keay at these works in his own name; and Mr. Keay will receive and pay accounts due to and from the old firm."

The plaintiffs continued to supply goods to Keay; and in September he sent the plaintiffs an acceptance for 55*l.* odd, for the amount; and he paid various sums on account by cheques and acceptances of third persons, without any appropriation. On the 23rd of October, 1874, the plaintiffs sent Keay the following account:

"London, S.E., 23/10/74.

"Mr. E. G. Keay, Birmingham.

Dr. To Hooper, Jeffery, & Raw.

1874.		£	s.	d.	£	s.	d.
May 20.	To accept. . .	132	2	8			
	Int. . . .	1	16	0			
Sept. 7.	Accept. . . .	55	12	11			
	Int. . . .		7	0			
					189	18	7
	Cr.						
May 19.	By cheque . .	50	0	0			
Aug. 11.	„ . .	20	0	0			
Sept. 23.	Bill 24 Dec. (P. Cunningham) . .	12	13	9			
Oct. 19.	By cheque . .	6	0	0			
„	Bill (Evans Bros.) Feb. 17 . . .	9	4	0			
					97	17	9
					£92	0	10"

1875

HOOPER v. KEAY.

After this account had been sent in, Keay sent the plaintiffs a cheque for 10*l.*, and an acceptance for 28*l.* 17*s.* 6*d.* without any specific appropriation; and this acceptance was ultimately paid.

On this evidence the learned judge directed a verdict for the defendant Draper, with leave to move to enter a verdict for the plaintiffs, if the Court should be of opinion that Draper's plea was not proved.

A rule having been obtained accordingly,

Lockwood shewed cause. The plaintiffs, having treated the old and new account as one, and sent the account in to Keay, striking a balance on the whole, cannot afterwards alter that account; and subsequent payments must be applied to the items of this account in order of date: *Simson* v. *Ingham.* (1) If the account had not been communicated to Keay, the case might have been otherwise: see per Bayley, J., in the same case.

Patchett, in support of the rule. The plaintiffs may be precluded, by having sent in the account they did, from saying now that the 132*l.* bill is not paid to the amount of 97*l.* But *Lodge* v. *Dicas* (2) shews that the plaintiffs, by taking Keay as their debtor, have not given up their remedy on the bill against Draper. And the payments subsequent to the 23rd of October, when the plaintiffs sent in their account, not having been specifically appropriated by Keay, the payer, may be appropriated at any time by the plaintiffs, the receivers: see per Holroyd, J., in *Simson* v. *Ingham.* (3) Consequently the plaintiffs had a right to treat the payments of 10*l.* and 28*l.* as payments on Keay's separate account. And then they had a right to come upon the defendant Draper for the balance due on his joint acceptance.

BLACKBURN, J. I am of opinion that the rule must be discharged. The two defendants, Keay and Draper, were in partnership, and were in debt to the amount of 132*l.* to the plaintiffs for goods sold, for which they gave their acceptance. They dissolved partnership in March, 1874, and they informed the plaintiffs of this, and that Keay would carry on the business and pay and

(1) 2 B. & C. 65, 72, 73. (2) 3 B. & Ald. 611.
(3) 2 B. & C. at p. 74.

receive the partnership debts. The plaintiffs continued to give credit to Keay just as before, and received payments from him on account. And they sent into Keay, in October, 1864, an account which begins, "Mr. Keay, debtor to Hooper & Co.," putting the acceptance for 132*l.* odd of Keay & Draper first; then there is an acceptance for 55*l.* and odd by Keay only, and on the credit side various payments amounting to 97*l.*, and shewing a balance against Keay of 92*l.* 0*s.* 10*d.* Had this account been only in the plaintiffs' ledger, it would not have bound them; but they sent the copy to Keay. After that, Keay made two more payments, which, together with the other payments, more than cover the amount of the 132*l.* bill and interest. On this state of facts, it is impossible to say that the payments must not be appropriated to the earlier item. In *Simson* v. *Ingham* (1), Bayley, J., said: "The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt." In the present case the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole; consequently the subsequent payments of 10*l.* and 28*l.*, which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date; and it follows that the whole of Draper's debt is paid off, and he is entitled to keep his verdict on the plea of payment.

QUAIN, J. I am of the same opinion. The two accounts have been blended by the plaintiffs, and this was communicated to the defendant Keay, consequently the general principle applies that

(1) 2 B. & C. at p. 72.

1875

HOOPER v. KEAY.

the payments are to be appropriated in order of date to the items of credit in order of date. This principle has always been acted upon unless there was anything in the circumstances of the case to lead to a contrary conclusion; as in *City Discount Co.* v. *McLean* (1), where Bramwell, B., says: "I quite agree with the principle of the cases cited, such as *Clayton's Case* (2), and *Bodenham* v. *Purchas* (3); and I think we ought to follow them where applicable. In those cases there had been a change of parties, and the account was apparently continued as if no alteration had happened; and it was, under the circumstances of those cases, reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit." In the present case the old and new accounts were made one by the plaintiffs to the knowledge of the defendant Keay on the 23rd of October, 1874, and the subsequent payments must follow the same appropriation.

FIELD, J. I am of the same opinion. This debt to the plaintiffs of 132*l.* was originally the joint debt of Keay and Draper, incurred at the time they were in partnership. The partnership was dissolved, and the account was still continued with Keay, and payments were made by him on account. The law on this point is clear, a debt primâ facie solvitur modo solventis, but if the debtor makes a payment, and there are two debts to which it may be appropriated, if no modus solvendi is pointed out by the payer, then the rule applies and the payment recipitur modo recipientis. The facts of the present case are very clear; there was no appropriation by the payer, and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties; and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date. This principle has been recognized in many cases. Thus in *Smith* v. *Wigley* (4), Tindal, C.J., said, he wished to be understood as deciding the case "upon the

(1) Law Rep. 9 C. P. 692, 698.
(2) 1 Mer. 605, 608.
(3) 2 B. & Ald. 39.
(4) 3 Moore & Scott, at pp. 179–180.

general rule of appropriation, which the law directs in the absence of any specific appropriation by the parties themselves, according to the rule laid down in *Clayton's Case* (1), in *Bodenham* v. *Purchas* (2), and in *Simson* v. *Ingham*. (3)"

1875

HOOPER v. KEAY.

The rule must therefore be discharged.

Rule discharged.

Solicitor for plaintiffs: *Mark Shephard.*

Solicitors for defendant: *Iliffe, Russell, & Iliffe.*

BETTINI *v.* GYE.

1876

Jan. 25.

Construction of Contract—Condition Precedent—Engagement to sing for fifteen Weeks at a Theatre and in Concert Halls and Drawing Rooms—Stipulations that Singer will be ready for Rehearsals six Days before the commencement of the Engagement.

1 QBD. 411
2 Mer Cas 461
47 LJ Q 91
5 Ap Cas 918
? plaintiff

Declaration that plaintiff, a singer, agreed with defendant, director of the Italian Opera in London, that he would undertake the part of first tenor in the theatres, halls, and drawing rooms in the United Kingdom during his engagement, to begin on the 30th of March, 1875, and terminate on the 13th of July, 1875, at a salary of 150*l.* per month. That plaintiff should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from the 1st of January to the 1st of December, 1875, without the written permission of defendant, except at more than fifty miles from London, and out of the season of the theatre. That defendant agreed to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals. Averment, that plaintiff did not sing anywhere in the United Kingdom from the 1st of January, 1875, to the date of the commencement of the action; that plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, on which day he arrived in London; and that, save as aforesaid, he was and is ready to perform his part of the contract. Breach, that defendant refused to receive plaintiff into his service.

Plea, that plaintiff was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore defendant refused to receive plaintiff into his service. Demurrer:—

Held, that the stipulation as to rehearsals was not a condition precedent; for that it did not go to the root of the matter, as plaintiff was to sing in concerts at halls and drawing rooms as well as at the theatre, and was also to abstain from singing within fifty miles of London from the 1st of January previous to the commencement of the engagement on the 30th of March. That the plea was therefore bad.

THIRD COUNT, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a

(1) 1 Mer. 605. (2) 2 B. & Ald. 39. (3) 2 B. & C. 65.

1876

BETTINI v. GYE.

dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows:—

"Royal Italian Opera,

"Covent Garden, London.

"Year 1875.

"The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

"1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye.

"2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

"3. The salary of Mr. Bettini shall be 150*l.* per month, to be paid monthly.

"4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

"5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters according to the ordinary usage of theatres.

"6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, &c.

"7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

"8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

"9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direc-

tion of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

"10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

"F. Gye,

"Milan, 14 Dec. 1874."

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his said engagement for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so, wherefore

1876

BETTINI v. GYE.

the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

1875. Dec. 15. *Murphy, Q.C.* (with him ~~*A. L.*~~ *Smith*), for the plaintiff, in support of the demurrer, contended that the stipulation as to the attendance of the plaintiff at rehearsals six days before the commencement of the engagement was not a condition precedent, inasmuch as the plaintiff was to sing during the engagement at concerts as well as in operas; moreover, the plaintiff was not to sing in London from the 1st of January, and he had abstained from doing so. He cited *Robinson* v. *Davison* (1), and *MacAndrew* v. *Chapple*. (2)

Arthur Wilson (with him *Percy Gye*) for the defendant, contended that the stipulation was a condition precedent. He cited *Atkinson* v. *Bell* (3); *Graves* v. *Legg* (4); *Bradford* v. *Williams* (5); *Tilley* v. *Thomas* (6); *Jackson* v. *Union Marine Insurance Co.* (7)

Murphy, Q.C., in reply.

Cur. adv. vult.

1876. Jan. 25. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in *Graves* v. *Legg* (8), "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the

(1) Law Rep. 6 Ex. 269.
(2) Law Rep. 1 C. P. 643.
(3) 8 B. & C. 277, 283.
(4) 9 Ex. 709; 23 L. J. (Ex.) 228.
(5) Law Rep. 7 Ex. 259.
(6) Law Rep. 3 Ch. 61.
(7) Law Rep. 10 C. P. 125.
(8) 9 Ex. at p. 716; 23 L. J. (Ex.) 228.

1876

BETTINI v. GYE.

agreement was made, but the Court must look at the general nature of such an engagement. By the 7th paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals." The engagement was to begin on the 30th of March, 1875. It is admitted on the record that the plaintiff did not arrive in London till the 28th of March, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised; and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams' Notes to Saunders, p. 554, in the notes to *Pordage* v. *Cole*, and in the second volume, p. 742, notes to *Peeters* v. *Opie*.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and primâ facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the 7th paragraph of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes

1876

BETTINI v. GYE.

default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged (1), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from the 30th of March to the 13th of July, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shews they must be so.

(1) In *Graves* v. *Legg*, 9 Ex. at p. 716; 23 L. J. (Ex.) 228.

1876

BETTINI v. GYE.

And, as far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must, therefore, we think, seek redress by a cross-claim for damages.

Judgment must be given for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *G. S. & H. Brandon.*

Solicitor for defendant: *Sweetland.*

HAMPDEN *v.* WALSH.

Jan. 17.

*Wager—Construction of Agreement—Action to recover Deposit—*8 & 9 *Vict. c.* 109, *s.* 18.

Plaintiff and W. deposited each 500*l.* with defendant, on an agreement that if W., on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of defendant, W. should receive the two sums deposited; but if W. failed in doing this, the two sums were to be paid to plaintiff. Defendant decided in favour of W.; to this decision plaintiff objected, and before defendant paid over the money to W. demanded the return of his 500*l.* deposited. Defendant, nevertheless, paid both sums to W., and plaintiff brought an action to recover his deposit:—

Held, that the agreement was a wager; but that, although 8 & 9 Vict. c. 109, s. 18, which makes all contracts by way of wagering null and void, enacts that no action shall be brought to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager, yet, on the authority of decided cases, that did not apply to the recovery of the sum deposited; and, that, therefore, plaintiff having demanded his deposit back before it had been paid over by defendant, he was entitled to judgment.

ACTION for money had and received, to recover 500*l.* deposited by the plaintiff with the defendant under the circumstances detailed in the judgment.

1876

HAMPDEN v. WALSH.

The facts, correspondence, &c., were stated at great length in the case, but all that is material is stated in the judgment of the Court.

1875. Nov. 12 and 15. *Ambrose, Q.C.* (with him *Willis*), for the plaintiff.

Robinson, Serjt. (with him *J. O. Griffiths, Q.C.*), for defendant.

In addition to the cases noticed in the judgment of the Court, the following cases were cited for the plaintiff: *Robinson* v. *Mearns* (1); *Batty* v. *Marriott.* (2) For the defendant: *Pugh* v. *Jenkins.* (3)

Cur. adv. vult.

1876. Jan. 17. The judgment of the Court (Cockburn, C.J., and Mellor and Quain, JJ.) was delivered by

COCKBURN, C.J. This is an action brought to recover the sum of 500*l.* deposited by the plaintiff with the defendant, under the following circumstances:—

The ~~defendant~~, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called *Scientific Opinion*, an advertisement in the following words: "The undersigned is willing to deposit 50*l.* to 500*l.* on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the united kingdom to prove the rotundity and revolution of the world, from scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to shew visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of

(1) 6 D. & R. 26. (2) 5 C. B. 818, 827; 17 L. J. (C.P.) 215.
(3) 1 Q. B. 631.

the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346, Strand, and of Mr. W. Carpenter, of 7, Carlton Terrace, Lewisham Park, or, if they differed, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in shewing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four miles, then a further period of one month is to be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was to be at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favour of Mr. Wallace, as having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's Dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the 500*l.* he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of 500*l.* to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agreement

1876

HAMPDEN v. WALSH.

amounts in effect to a wager; and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, s. 18, is prevented from maintaining this action.

We will, in the first instance, proceed with the case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by the effect of the statutes of 16 Car. 2, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being made null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with the stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in *Hodson* v. *Terrill* (1), notice had been

(1) 1 Cr. & M. 797.

given to the stakeholder prior to the event being determined, but also, where, as in *Hastelow* v. *Jackson* (1), notice was given after the event had come off.

In *Hodson* v. *Terrill* (2) the deposit had been made on a cricket match for 20*l.* a side, and was therefore unlawful within the statute of Anne. A dispute having arisen in the course of the match, and one side having refused to play it out, the plaintiff, who had paid a deposit, claimed to have it returned, and it was held that he was entitled to recover.

So in *Martin* v. *Hewson* (3), in an action for money had and received to plaintiff's use, the defendant having pleaded that the money had been deposited with him to abide the event of a cock-fight, the replication, that before the result was ascertained the plaintiff repudiated the wager, and required repayment of the deposit, was held good. In *Hastelow* v. *Jackson* (1) the Court of Queen's Bench, following the prior cases of *Cotton* v. *Thurland* (4), *Smith* v. *Bickmore* (5), and *Bate* v. *Cartwright* (6), held that, where, money having been deposited with the stakeholder to abide the event of a boxing match, A., the depositor, claimed the whole sum from the stakeholder, as having won the fight, and threatened him with an action if he paid it over to B., the other combatant, which he nevertheless did by direction of the umpire, A. was entitled to recover the money he had deposited as his own stake as money had and received to his use. "If," says Bayley, J., "a stakeholder, pays over the money without authority from the party and in opposition to his desire, he does so at his own peril." These cases have never been overruled, and must be considered as law; although in *Meaning* v. *Hellings* (7), Alderson, B., speaks doubtingly of the decision in *Hastelow* v. *Jackson* (1), using the expression, "that case does not convince me, it overcomes me." But that case seems to have been decided more on the form of the particulars than anything else, and does not seriously interfere with the authority of *Hastelow* v. *Jackson* (1), which seems to us to be good law.

(1) 8 B. & C. 221.
(2) 1 Cr. & M. 797.
(3) 10 Ex. 737; 24 L. J. (Ex.) 174.
(4) 5 T. R. 405.
(5) 4 Taunt. 474.
(6) 7 Price, 540.
(7) 14 M. & W. at p. 712.

1876

HAMPDEN v. WALSH.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager, and others, in which the wager, not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing, who can at any time claim it back before it has been paid over. In the latter, the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid, it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal; and the Courts of King's Bench and Exchequer were at variance on this point. In *Eltham* v. *Kingsman* (1) the Court of King's Bench, consisting of Lord Ellenborough, C.J., Bayley, Abbott, and Holroyd, JJ., held, that even where a wager was legal, the authority of a stakeholder, who was also (as is the case with the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here," says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man," says Abbott, J., "who has made a foolish wager may rescind it before any decision has taken place." In the later case of *Emery* v. *Richards* (2) the Court of Exchequer, where money had been deposited on a wager of less than 10*l.* on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict., not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of *Eltham* v. *Kingsman* (1) does not, however, appear to have been brought to the notice of the Court, and in our view the decision of this Court was the sounder one. We cannot concur in what is said in Chitty on Contracts, 8th ed., p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the

(1) 1 B. & Ald. 683. (2) 14 M. & W. 728.

authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this Court in the two cases of *Eltham* v. *Kingsman* (1) and *Hastelow* v. *Jackson* (2); and in that view we concur.

Practically, however, it is now unnecessary to decide this question, if the transaction under consideration is to be looked upon as a wager. For by 8 & 9 Vict. c. 109, s. 18, it is enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action—a question on which a difference of opinion exists. The question arose in *Varney* v. *Hickman*. (3) The plaintiff and one Isaacs had deposited 20*l*. each with the defendant on the event of a match between two horses. Before the race was run the plaintiff gave notice to the defendant that he declined the bet and demanded back his deposit. The plaintiff not attending to contest the race, Isaacs was declared the winner, and the amount of the two deposits was handed over to him by the defendant. An action for money had and received having been brought by the plaintiff to recover the amount of his deposit, the statute 8 & 9 Vict. c. 109, s. 18, was relied upon for the defence. But it was held by the Court, consisting of Maule, Cresswell, and Williams, JJ., that the part of

(1) 1 B. & Ald. 683. (2) 8 B. & C. 221.
(3) 5 C. B. 271; 17 L. J. (C.P.) 102.

1876

HAMPDEN v. WALSH.

s. 18 relating to deposits was meant to apply only to the non-recovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over.

In the later case of *Martin* v. *Hewson* (1), already referred to, the Court of Exchequer adopted the view of the Common Pleas in *Varney* v. *Hickman* (2), Parke, B., saying: "According to the context, the statute prohibits the recovery of money which has been won in such a transaction, or has been deposited to abide the event of a wager, but it does not apply to the case where a party seeks to recover his stake upon a repudiation of the wagering contract."

But in *Savage* v. *Madder* (3), Martin, B., expressed a decided opinion that no action could be brought, either directly upon the contract, or in respect of money deposited by the winner himself in the hands of a stakeholder to abide the event. "It is," said the learned judge, "in fact, expressly within the Act of Parliament; and more than that, it is within what the Act intended to effect. The object of the Act was to prevent trials in courts of law with respect to betting contracts; and rightly so, for they are contracts in relation to transactions with which the time of the courts of law ought not to be occupied. A man who makes bets must take his chance of getting his money. A bet ought to be a contract of honour; and if the loser cannot pay, no action should be maintainable in respect of the debt." What was thus said was, however, unnecessary to the decision of the question before the Court. For the plaintiff there claimed the entire stakes as his by the event; he had never repudiated the wager or revoked the authority of the stakeholder. He was seeking to enforce the wager, and was met by the statute and defeated by the effect of the enactment. The question again arose directly in the case of *Graham* v. *Thompson* (4), in the Court of Common Pleas in Ireland, where, in an action for money had and received, the defendant pleaded specially, "that the money was money deposited in the hands of the defendant to abide an event on which a wager had

(1) 10 Ex. 737; 24 L. J. (Ex.) 174.
(2) 5 C. B. 271; 17 L. J. (C.P.) 102.
(3) 36 L. J. (Ex.) 178.
(4) Ir. Rep. 2 C. L. 64.

thereupon been made, to wit, &c., and that that wager had not been repudiated, or any demand of the said money, or any part thereof, made upon him by the plaintiff before the event on which the said wager had been made had taken place, and the said wager had been decided." The plaintiff demurred to this defence, on the ground that it was consistent with it that the plaintiff had repudiated the wager before the defendant had paid over the money to the winner. And the Court, taking the same view as had been taken in *Varney* v. *Hickman* (1) and *Martin* v. *Hewson* (2), held the demurrer good. It is unnecessary to say what our view might have been had the matter been res integra; we are bound by the authority of these decisions, which, if they are to be reviewed, can only be reviewed in a court of appeal.

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favour the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the Court in the cases of *Eltham* v. *Kingsman* (3) and *Hastelow* v. *Jackson* (4), before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer

(1) 5 C. B. 271; 17 L. J. (Ex.) 174.
(2) 10 Ex. 737; 24 L. J. (Ex.) 174.
(3) 1 B. & Ald. 683.
(4) 8 B. & C. 221.

Q. B. C. 1 Jur. N. S. 214.

1876

HAMPDEN v. WALSH.

justified in paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. E. Copp.*
Solicitor for defendant: *W. Jaquet.*

Jan. 19.

THE QUEEN *v.* LEE.

Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 95—*Indictment directed by Justices for trying Obligation to repair—Costs of "such prosecution."*

On a summons for non-repair of a highway the obligation to repair to the extent alleged was disputed, and thereupon the justices, under s. 95 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), directed an indictment.

Upon the trial there was no evidence of obligation to repair the road as a general highway, and the indictment was amended so as to be restricted to the limited obligation, which was not in dispute:—

Held, that an order under the above section, that the costs of the prosecution should be paid out of the highway rate could not be made by the judge of assize; for that the prosecution, though originally a prosecution directed by the justices, was no longer, after the amendment, "such prosecution" within the words of the section.

RULE calling upon Robert Lee to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, an order made by Field, J., at the York summer assizes, upon an indictment by Lee against the inhabitants of the township of Ellerton for non-repair of a highway, directing the costs of the prosecution to be paid out of the highway rate made and levied in the township.

The surveyors of highways of Ellerton were summoned before justices to answer an information laid by Lee, charging that a certain highway for horses, carts, and carriages in the township was out of repair. Upon the hearing of the summons the liability to repair was denied by the surveyors on behalf of the township;

1876

THE QUEEN v. LEE.

and the justices thereupon, under s. 95 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50) (1), directed an indictment to be preferred at the assizes against the inhabitants of the township for permitting the highway to be out of repair.

An indictment was preferred accordingly. The defendants pleaded not guilty. Upon the trial Field, J., expressed an opinion that there was no evidence of obligation to repair the way as a highway for carts and carriages, but, the defendants not disputing their obligation to repair the way as a highway for horses, he ordered the indictment to be amended by limiting it to a horseway; and, on the indictment as so amended, a verdict of guilty was entered.

Application was afterwards made on behalf of Lee, the prosecutor, for an order under the above section for payment of the costs of the prosecution, and Field, J., deeming himself bound by the terms of the section, made the order.

This rule was obtained on behalf of the township for the purpose of quashing the order, on the ground that the indictment had, by the effect of the amendment, ceased to be the indictment directed by the justices.

The affidavits on which the rule was obtained stated, in addition to the above facts, that at the hearing before the justices liability to repair the road as a horseway was not denied. The affidavits in answer merely alleged that no distinction was made between liability to repair the road as a horseway and liability to repair it as a cartway.

Maule, Q.C., and *E. Wilberforce*, shewed cause. Whatever takes place on the trial, the costs of a prosecution ordered by justices

(1) Sect. 95 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), enacts that "if on the hearing of" a "summons" (under s. 94) "respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish or by any other party charged therewith . . . . it shall be lawful for" the "justices . . . . to direct a bill of indictment to be preferred against the inhabitants . . . . for permitting the said highway to be out of repair, and the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried or justices at quarter sessions, to be paid out of the rate made and levied . . . . in the parish in which such highway shall be situate . . . ."

1876

THE QUEEN v. LEE.

under s. 95 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), must under that section be allowed. The enactment is imperative and unconditional, and a verdict of not guilty would not have prevented it from applying. No question arises as to the validity of the order of the justices, such as arose in *Reg.* v. *Farrer* (1) and in the earlier case of *Reg.* v. *Heanor* (2); for the road was admitted to be a highway, but denied to be repairable as a cartway. The amendment was within the powers given by s. 1 of 14 & 15 Vict. c. 100 (for improving the administration of criminal justice): *Reg.* v. *Sturge.* (3)

[MELLOR, J. The words of the section of the Highway Act directing costs are the costs of "such prosecution," that is, costs of the prosecution ordered by the justices, which this indictment had ceased to be.]

A. Wills, Q.C., in support of the rule, was not heard.

COCKBURN, C.J. I am of opinion that this rule should be made absolute. The power to make the order for costs under s. 95 depends upon the power of the justices to order the prosecution. The justices, in the present case, ordered a prosecution as to a highway generally; but, the prosecution not succeeding in respect of a general highway, the indictment was restricted, by amendment, to a limited highway, as to which, it is agreed, the justices had no power to order a prosecution, the liability to repair the way as a limited highway not being in dispute.

MELLOR, J. I am of the same opinion. The magistrates ordered a prosecution as to a highway generally, and the costs which the Act requires to be allowed are the costs of "such prosecution," that is, the prosecution ordered by the justices, and it does not extend to the costs of a prosecution which the justices did not and could not order.

FIELD, J. I am of the same opinion. I made the order reluctantly, but thought myself compelled by the statute. I am

(1) Law Rep. 1 Q. B. 558.
(2) 6 Q. B. 745; 14 L. J. (M.C.) 38.
(3) 3 E. & B. 734; 23 L. J. (M.C.) 172.

now satisfied that I was wrong, and I think also that this decision will do substantial justice.

Rule absolute.

Solicitors for applicants: *Williamson, Hill, & Co., for England & Son, Howden.*

Solicitors for Lee: *Learoyd, Learoyd, & Peace, for Bantoft, Selby.*

THE QUEEN *v.* ADAMSON AND OTHERS, JUSTICES OF NORTH SHIELDS.

1875 *Dec.* 21.

Justice of the Peace—Refusal to issue Summons—Exercise of Discretion—11 & 12 *Vict. c.* 42, *s.* 9—*Mandamus.*

Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace and do grievous bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which the defendants took part, and that one or other of them had previously offered money to different persons if they would commit acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, and a rule nisi for a mandamus having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit:—

Held, that the rule must be made absolute, for although under 11 & 12 Vict. c. 42, s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion.

RULE calling upon H. E. P. Adamson, Mayor of North Shields, Northumberland, and others, justices of the borough, to shew cause why a mandamus should not issue, commanding them to proceed to hear and determine the matter of an application by R. Kiley, for a summons against J. F. Spence, J. Short, G. Kidd, — Pye, junior, J. Fenwick, F. Fenwick, G. Wright, and others, for unlawfully and wilfully combining and conspiring to break the peace and do grievous bodily harm to several persons, at the Albion Assembly Rooms, the Albion Hotel, and elsewhere, at North Shields, on the 14th of October, 1875.

It appeared that in November, 1875, application was made at the police court at North Shields, to the mayor and other justices, to issue summonses in the form stated in the rule. The charge was founded upon a riot which was stated to have occurred at a meeting which took place in the previous October,

1875

THE QUEEN v. ADAMSON.

at the Albion Assembly Rooms. This meeting consisted of members and supporters of an association called the Magna Charta Association. The solicitor who made the application read the written statements of a number of witnesses, who were present, and ready to verify their statements on oath. The statement of R. Kiley was that the Assembly Rooms had been hired for a lecture on the 14th of October, by Dr. Kenealy, on the Tichborne case; that Spence joined in making a disturbance at the meeting, and that after the meeting was over he, together with the Fenwicks and G. Kidd, attacked the witness and Dr. Kenealy at the Albion Hotel, and both struck and threw glasses at them. A second witness stated that during the meeting the Fenwicks and Kidd attempted to set the hall on fire with gun cotton. A third witness stated that during the meeting he saw G. Wright throwing Cayenne pepper about the place. A fourth witness stated that on the day of the meeting he was paid money by Short to make a disturbance at the meeting. A fifth witness stated that on the night of the 14th of October, 1875, he saw the defendants making a great disturbance at the meeting, striking people right and left; saw Kidd set fire to a cracker and toss it into the Assembly Room, where there were a lot of people waiting to hear Dr. Kenealy, and that at one time Kidd and his friends blocked up the staircase, and prevented the witness from getting into the room. The deposition of Rogers was that Short came to him with a friend of the name of Ferguson, and said he wanted a few good men to go on the evening of the 14th of October to the Assembly Rooms, to shout, and to smash, and to "clear up everything and anybody who came in their road from among the friends of Dr. Kenealy." About seven o'clock in the evening before the meeting, Short gave the witness and several others whom he had hired some drink, and he gave Taylor another shilling for some more drink, after which they went to the Albion Assembly Rooms.

The magistrates, after hearing these statements read, refused, without giving any reason, to issue the summonses.

In answer to the rule they made an affidavit stating that when the application was made they fully considered it, and came to the conclusion that they would not be justified in granting summonses for conspiracy, as the facts brought before them were not,

in their opinion, sufficient to justify them in summoning the persons accused to answer for such offence.

Poland (*Hawkins, Q.C.*, with him), shewed cause. The justices in refusing to issue the summonses exercised a discretion over which this Court has no control. In granting a distress warrant for a poor-rate the justices act in a ministerial capacity, but where application is made to them for a summons it is their duty to hear the evidence, and if they think there is no evidence upon which a jury would convict, to refuse the application. This is exactly what was done here.

[BLACKBURN, J., referred to 11 & 12 Vict. c. 42, s. 9. (1)]

The words "if they think fit," in s. 9 shew that there is no absolute right to a summons. In *Ex parte Wason* (2) Cock-

(1) By 11 & 12 Vict. c. 42, s. 1, "In all cases where a charge or complaint shall be made before any one or more of Her Majesty's justices of the peace of any county, riding, division, &c., or place within England and Wales that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, within the limits of the jurisdiction of such justice or justices of the peace, then and in every such case if the person so charged or complained against shall not then be in custody, it shall be lawful for such justice or justices to issue his or their warrant to apprehend such person, &c. Provided always, that in all such cases it shall be lawful for such justice or justices to whom such charge or complaint shall be preferred, if he or they should so think fit, instead of issuing in the first instance his or their warrant, to issue his or their summons directed to such person, requiring him to appear before the said justice or justices, &c."

By s. 8, "In all cases where a charge or complaint for any indictable offence shall be made before such justice or justices as aforesaid, if it be intended to issue a warrant in the first instance against the party or parties so charged, an information or complaint thereof in writing shall be laid before such justice or justices: Provided always, that in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing or be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath or affirmation whatsoever to support or substantiate the same."

By s. 9: "Upon such information and complaint being so laid as aforesaid the justice or justices receiving the same may if he or they shall think fit issue his or their summons or warrant as hereinbefore is directed to cause the person charged as aforesaid to be and appear before him or them or any other justice or justices of the peace for the same county, &c., to be dealt with according to law."

(2) Law Rep. 4 Q. B. at p. 575.

1875

THE QUEEN v. ADAMSON.

burn, C.J., says, "I have no doubt that, supposing the matter brought before the magistrate does not establish facts upon which an indictment could be preferred and sustained, the magistrate has a discretion which if rightly exercised we ought to uphold." It will be argued that it is the duty of justices to commit or bail the person charged, or take the recognizance of the prosecutor under the Vexatious Indictments Act (22 & 23 Vict. c. 17, s. 2), and that if they refuse a summons they deprive the prosecutor of these alternatives. But, first, there is nothing in the section to prevent the prosecutor from applying to be bound over when a summons is refused; secondly, no application was made by the prosecutor that he might be bound over to prefer an indictment; and, thirdly, it cannot be contended that the prosecutor has an absolute right to be bound over where the justices honestly think that upon the evidence there is no ground for a summons.

Sir H. Giffard, S.G. (*Philbrick, Q.C.*, with him) in support of the rule. There can be no doubt that a discretion is vested in the justices as to issuing a summons, but in the present case it cannot be said that they have exercised it. The discretion must be a legal discretion, based upon legal grounds. In *Reg.* v. *Boteler* (1) where justices, who, under 2 & 3 Vict. c. 84, were empowered to issue a distress warrant "if they should think fit," refused to do so because they did not think that an extra-parochial place ought to contribute to the common fund of the union, the Court made a rule absolute with costs, directing them to issue the warrant.

[COCKBURN, C.J. That case is distinguishable. There they refused to exercise their discretion because they thought the law unjust.]

In *Ex parte Woolf* (2), where a magistrate refused to issue process on the ground that it appeared to him to be an attempt to enforce a civil right through a criminal court, a mandamus was granted. Again, the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1, has in charges for certain offences (including conspiracy) reserved to the prosecutor the right of asking the magistrate to commit, or to dismiss the charge, and the magistrates ought to have granted the summons in order to bring the matter to a final decision, and to that stage where the prosecutor is

(1) 4 B. & S. 959; 33 L. J. (M.C.) 101. (2) H. T. 1871; not reported.

enabled to ask that he may be bound over to prefer an indictment. The only limit on this obligation is that the information must disclose an indictable offence. Here there was the strongest evidence in support of the charge.

COCKBURN, C.J. This is a case of some perplexity, but on the whole I am of opinion that the rule should be made absolute. Nothing can be clearer than that this Court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it, in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction. If they had issued summonses, and heard this evidence upon oath, and had determined that it was not trustworthy, the matter would have been one of which they would have been the sole judges; but I cannot but think that what they did was not merely to consider whether or not the witnesses were worthy of belief. I think it very probable that they thought that they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction. It would be more satisfactory if the matter were to go before different magistrates; but this, of course, is a question for the prosecution. All we need say is, that the answer of the magistrates is not sufficient to lead us to believe that they have exercised their discretion upon the facts presented to them.

BLACKBURN, J. I am of the same opinion. I have hesitated, and still hesitate, but I do not dissent from the conclusion at

1875

THE QUEEN v. ADAMSON.

which the rest of the Court have arrived. It is quite clear that, by the early law which was practically re-enacted in Jervis's Act, the magistrates, upon application for a summons, were bound to hear the evidence brought before them. The evidence need not have been in writing or on oath, but they were bound to hear it, and the question is, when they have heard it, are they, if there is any evidence of an indictable offence, bound to issue summonses to bring the persons charged before them. I think they are not absolutely bound to do so; the words in 11 & 12 Vict c. 42, s. 9, "if they shall think fit," shew that they have a discretion; and the difficulty is, whether we can see that they have not exercised a discretion. Had the charge been one of a conspiracy to murder Dr. Kenealy, or to blow up the Assembly Rooms, the justices might have been quite right in thinking this an incredible story, and that there was no reasonable evidence of an agreement to do any such thing. But here the evidence of a conspiracy to disturb the meeting was strong, and it seems to me that the justices very likely thought, looking at the whole matter, that it was undesirable for the interests of the borough that the prosecution should go on.

Then comes the question, Can we say that the magistrates have gone wrong? I think that when they think the charge frivolous or vexatious they are not bound to grant an application for summonses. But here there is reason for saying that they proceeded on some ground which they ought not to have considered. I have said that I hesitate, but I do not dissent from the opinion that this rule should be made absolute; and I quite agree that it will be better to renew the application before different justices.

FIELD, J. I am of the same opinion. I am the last person to infringe on the rule that this Court has no jurisdiction to interfere with the decision of justices where they have decided upon a question of fact, but here I have come to the conclusion that they did not consider the question of fact which came before them. What the justices have to consider is, whether there was primâ facie evidence of a criminal offence which, in their judgment, calls upon the alleged offender to answer. If they think that there is such primâ facie evidence, it is their duty to issue summonses. Now, if

1875

THE QUEEN v. ADAMSON.

the justices had said, "We don't believe the evidence," or given any other reasonable ground for refusing to grant what was asked for, we should not interfere. But I have come to the conclusion that they acted as they did, not because they disbelieved the evidence, but from a consideration apart from the facts, which they ought not to have taken into account.

Rule absolute.

Solicitor for prosecution: *E. Kimber.*

Solicitors for justices: *Redpath & Holdsworth.*

THE QUEEN *v.* RAFFLES, POLICE MAGISTRATE FOR LIVERPOOL, AND J. STEADMAN.

1876

Jan. 17.

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Selling Intoxicating Liquor at Place not authorized by Licence—Addition to Licensed Premises.*

A house licensed under the Licensing Act, 1872 (35 & 36 Vict. c. 94), for the sale of intoxicating liquors by retail, was enlarged by the occupier, and the sale of such liquors was carried on in the part added:—

Held, that the licence must be taken to include reasonable additions to the original premises, and that it was a question of fact whether, after such alterations, the premises were substantially the same as those licensed.

RULE calling upon T. S. Raffles, police magistrate of Liverpool, and upon J. Steadman, to shew cause why a case should not be stated under 20 & 21 Vict. c. 43, setting forth the grounds of the magistrate's determination dismissing an information laid by N. Smyth against Steadman for selling intoxicating liquors at a place not authorized by his licence, contrary to 35 & 36 Vict. c. 94, s. 3. (1)

According to the affidavits and admissions made upon the argument of the rule, the facts were the following:—Steadman was the holder, by transfer, of a licence for the year from the 10th of October, 1874, to the 10th of October, 1875, to sell intoxicating liquors by retail at "1, Blundell Street," Liverpool. When the licence was granted there was adjacent to the house a vacant piece of land, in different occupation and ownership, having a frontage in Blundell Street of 12 ft. 8 in., and a frontage in another street, Jamaica

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, "No person shall sell or expose for sale any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same."

1876

THE QUEEN v. RAFFLES.

Street, of 13 or 14 feet. This vacant land was afterwards leased to the owner of 1, Blundell Street, who then enlarged the house by building on the vacant land, and an entrance was made in Jamaica Street. The whole building was in the occupation of Steadman, and intoxicating liquors were sold in the added part. An information having been laid charging that Steadman, being a licensed victualler licensed to sell intoxicating liquors by retail on certain premises situate No. 1, Blundell Street, sold intoxicating liquors by retail at a place where he was not authorized by his licence to sell the same, to wit, at a place situate in Jamaica Street, contrary to 35 & 36 Vict. c. 94, s. 3, the magistrate decided that the premises were the same, and refused to state a case under 20 & 21 Vict. c. 43. The rule was then obtained.

Poland and *H. H. Bremner* shewed cause. The question whether the premises are the same is a question of fact: *Reg.* v. *Albert Smith.* (1) It is necessarily a question of degree, and cannot be treated as a question of law. To make the rule absolute would be to decide that a licence applies only to exactly the original premises. Sect. 46 of 35 & 36 Vict. c. 94, which enables justices to grant a licence upon conditions that the holder improves the premises so as to make them of sufficient annual value, shews that the legislature contemplates addition to licensed premises.

Pope, Q.C. (*T. S. Little* with him), in support of the rule. The real question is, what was covered by the licence?

[MELLOR, J. Metes and bounds are surely not necessary.]

They are in effect required. The legislature in passing the Act, 35 & 36 Vict. c. 94, had in view, as shewn by the preamble, the better prevention of drunkenness; and to hold that licensed premises may be enlarged, and that the licence will cover the premises so enlarged, would be contrary both to the spirit and the letter of the Act. The fact that an entrance was made in the added part opening into a new street must, at all events, be held to prevent the licence from applying. Sect. 47 requires the value of the premises to be ascertained, and enlargement would be inconsistent with the provisions of that section. The 46th section does not contemplate an enlargement of premises, but only an improvement.

(1) 15 L. T. (N.S.) 178.

1876

THE QUEEN v. RAFFLES.

COCKBURN, C.J. I am of opinion that this rule must be discharged. Whether the premises to which the licence is granted and the premises used are the same, is a question of fact for the magistrate. I do not mean to say that if the magistrate had gone extremely wrong—that if, for instance, he had held an addition of a whole street of houses to be immaterial, it would not have been right that we should review his decision. But it would be necessary for us to see that the magistrate's decision was clearly wrong. Here we cannot see that it was so. Only 12 feet were added; and the licence must be taken to mean whatever can be fairly called "1, Blundell Street."

MELLOR, J. I am of the same opinion. We were very properly referred by Mr. Pope to the preamble of the Act, as shewing the legislature to have had in view "the better prevention of drunkenness;" but the accomplishment of that purpose can only be by the means provided by the Act. The question here is whether the house was that to which the licence was granted. I think that whether the house is the same house or not is, within reasonable limits, purely a question for the magistrate, though I agree that, if the magistrate gave an outrageously wrong decision, we might interfere.

FIELD, J. I am of the same opinion. If we had to construe the licence strictly with reference to the date of the licence, no doubt we should have to say that the premises are not the same. But the licence says merely "1, Blundell Street;" and, looking to the purposes of the licence, which are very different from those of a deed of conveyance, I think we should be wrong so to construe it. I was struck with Mr. Pope's reference to the fact that, not only had land been added and built upon, but a new entrance added in a new street; I think, however, that that is to be regarded as an improvement, and that the identity of the premises was not destroyed.

Rule discharged.

Solicitor for appellant: *J. A. Redhead.*
Solicitors for respondent: *Gregory, Rowcliffe, & Co.*

1876
Jan. 26.

LYONS *v.* ELLIOTT.

Distress—Privilege of Goods to be sold by Auction—Privilege confined to the Premises of the Auctioneer.

The privilege from distress of goods delivered to an auctioneer for sale is confined to goods on the premises of the auctioneer, and does not extend to goods sold on the premises of the owner of the goods.

A sale by auction of V.'s goods on the premises of V. having been advertised, plaintiff delivered some plate to the auctioneer to be sold along with V.'s goods. The auctioneer placed the plate on V.'s premises, where it was distrained during the auction by the landlord for rent in arrear:—

Held, that the plate was not privileged; and the distress was valid.

DECLARATION for seizing and converting silver spoons and forks of the plaintiff.

Plea, not guilty, by statute 11 Geo. 2, c. 19, s. 21.

Issue joined.

At the trial before Quain, J., at the Middlesex sittings in Trinity term, 1875, it appeared that one Valpy, in order to furnish his house at Worthing, had bought furniture of one Strickland, an auctioneer carrying on business at Gravesend, under an agreement by which Valpy was to pay 200*l.* down, the rest of the price to be paid by monthly instalments of 20*l.*, and in default Strickland was to have a right to seize the furniture and sell on Valpy's premises. Default having been made, Strickland entered and seized, and advertised a sale by auction by him of Valpy's furniture on Valpy's premises for the 26th and 27th of January, 1875.

The plaintiff, a silversmith at Chatham, having seen Strickland's advertisement of the sale at Valpy's house, asked Strickland to put some silver plate of the plaintiff into the sale and sell it for him. Strickland agreed to do this, and the plaintiff left the plate at Strickland's premises, and he afterwards sent it to Valpy's house, and it was catalogued along with the furniture. On the 27th of January, the second day of the sale, a warrant of distress was put in by the defendant, the landlord of Valpy's house, for 15*l.* 15*s.*, a quarter's rent in arrear, and, at the request of Strickland, the plaintiff's plate was seized as being a small lot sufficient to cover the amount due.

On this evidence, a verdict was found for the plaintiff for 35*l.*,

the value of the plate; leave being reserved to move to enter a verdict for the defendant, if the Court should be of opinion that the plate was not privileged from distress; the Court to draw inferences of fact.

A rule having been obtained accordingly,

Rolland and *Grubbe* shewed cause. These goods having been delivered to the auctioneer for the purpose of sale, were privileged as long as they were in the auctioneer's possession, and it is immaterial where the auction is held: *Adams* v. *Grane* (1); *Brown* v. *Arundell* (2); *Williams* v. *Holmes*. (3) In *Brown* v. *Arundell* the auctioneer was a trespasser, and yet the goods were held privileged.

[BLACKBURN, J. The Court said he was in possession, and that the privilege could not depend upon his having a good title.]

In other words, mere possession of the auctioneer is sufficient. In other cases the privilege is not confined to the premises of the person exercising the trade. Thus goods delivered to a carrier to be carried are privileged from distress, though not on the carrier's premises: *Gisbourn* v. *Hurst*. (4) Thus, in *Findon* v. *McLaren* (5), it was held that it need not be alleged, in claiming the privilege, that the premises in respect of which it was claimed were habitually used for the purpose. So it is laid down that goods going to a market are privileged: Co. Litt. 47 a. At all events, any temporary possession of the premises by the auctioneer is sufficient.

[QUAIN, J., referred to *Thomson* v. *Mashiter*. (6)

LUSH, J. If these goods are privileged so must the goods of Valpy be. If so, a tenant may always oust his landlord of his distress by calling in an auctioneer.]

The tendency of the decisions of the Courts has been to extend this privilege against the harsh law of distress: *Brown* v. *Shevill*. (7)

E. Wilberforce and *J. D. Fitzgerald*, in support of the rule. The case of *Adams* v. *Grane* (1), which first established the privilege in the case of goods entrusted to an auctioneer, is strong to shew

(1) 1 Cr. & M. 380.
(2) 10 C. B. 54; 20 L. J. (C.P.) 30.
(3) 8 Ex. 861; 22 L. J. (Ex.) 283.
(4) 1 Salk. 249.
(5) 6 Q. B. 891.
(6) 1 Bing. 283.
(7) 2 Ad. & E. 138.

1876

LYONS v. ELLIOTT.

that the privilege is confined to goods on the premises of the auctioneer. In that case the goods were seized in rooms regularly let out to auctioneers for the purpose of public sales; and Bayley, B., expressly confines the privilege to such premises: "The first question is, whether goods in the hands of an auctioneer, upon the premises of an auctioneer, for purpose of sale by the auctioneer, are or are not privileged from being distrained for the rent arising due in respect of the auction rooms; and I am of opinion that they are privileged; and I think that they are privileged because it is for the convenience and benefit of trade and the general commonwealth. The privilege in question has been established for a very considerable period of time. Lord Coke (Co. Litt. 47 a), treats of it as being well known, and the principle of the exemption, according to him is, that it is for the benefit of trade. Among other instances put by him is the instance of goods going to a fair or market. Now why are they privileged? They are privileged because interest reipublicæ that buyer and seller should be brought together; that a man should have an opportunity of going to some particular place to which goods might be brought for the purpose of sale. . . . The privilege has from time to time been extended, according to new modes of dealing established between parties; and one of the modern modes is the case of a factor; and I should observe what is noticed by Mr. Justice Blackstone in his Commentaries (vol. 3, p. 8), that there is no hardship in the privilege, which is allowed to exist in these cases, because the privilege generally arises to goods which no one would suppose to be the property of the individual from whom the rent was due." The learned judge then proceeds to shew that an auctioneer is a kind of factor. And adds: "The seller is desirous, and in many instances it is essential, that the goods should be sold on premises belonging to the auctioneer, and not on the premises of the owner of the goods."

[LUSH, J. The passage from Blackstone is quoted in the last edition of Gilbert on Distress, p. 35.

BLACKBURN, J. I doubt the presumption as to the goods not being the tradesman's own being the true reason of the privilege; it is for the benefit of trade.]

And it is therefore confined to the premises of the person who

carries on that trade. The case of *Crosier* v. *Tomkinson* (1) in Barnes' Notes is very analogous.

[QUAIN, J. There is a better note of that case in 2 Lord Kenyon.]

It shews that the privilege of an inn is confined to the inn premises, and does not extend to a stable at a distance temporarily used by the innkeeper. In the two other cases as to auctioneers cited for the plaintiff, *Brown* v. *Arundell* (2) and *Williams* v. *Holmes* (3), the auctioneer was held on the facts to be in occupation of the room or premises in which a general auction was being held; which at once distinguishes them from the present case, in which it cannot be contended that the auctioneer had any possession of the premises of which Valpy was the tenant and occupier. In *Muspratt* v. *Gregory* (4), in the considered judgment of the Court of Error, it was determined that this kind of privilege was not to be extended; and on this the Court of Exchequer acted in *Joule* v. *Jackson*. (5)

BLACKBURN, J. I think, now the facts are ascertained, that the verdict must be entered for the defendant, on the ground that under the circumstances the goods were not privileged from distress. No doubt the general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid or the service performed. This state of the law produced no harm, because at common law the landlord not being able to sell the distress, he generally gave up the goods as soon as he found they were not the tenant's, as his continuing to hold them would not induce the tenant to pay. But in the reign of William and Mary a very harsh and unjust law (2 Wm. & M. s. 1, c. 5) was passed by which the right was given to the landlord to sell any goods seized, and to apply the proceeds to the payment of the rent unless the tenant or owner of the goods first paid it; and this held out a great temptation to a landlord to seize the goods of a stranger although he knew that they were not

(1) Barnes, 472; 2 Ld. Ken. 439.
(2) 10 C. B. 54; 20 L. J. (C.P.) 30.
(3) 8 Ex. 861; 22 L. J. (Ex.) 283.
(4) 3 M. & W. 677.
(5) 7 M. & W. 450.

1876

LYONS v. ELLIOTT.

the tenant's. That is why I doubt whether the reason sometimes assigned for the privilege of goods intrusted to persons exercising certain trades, that they presumably do not belong to the tenant, is the real one. The ground of the privilege is public policy for the benefit of trade; and the privilege is given to the person carrying on the trade, that is, where goods are intrusted to a person in order that he may exercise his trade upon them, they should be privileged from distress at the suit of the landlord of the premises where the trade is exercised. The case of goods in the hands of a carrier, or of goods going to market, is exceptional; the carrier or person taking the goods to market must rest somewhere; in such cases the goods are privileged, though in a private house, not the person's own; and it is very similar to the privilege attaching to goods of a traveller at an inn. The principle is that when a person occupies certain premises and carries on a public trade there, goods which are brought to those premises for the purposes of that trade are privileged. But when the person exercises the trade not on his own premises, are the goods on those premises privileged? I think not.

In the present case it is immaterial whether the goods advertized to be sold were the auctioneer's or the tenant's, they were not on the auctioneer's premises, but on the tenant's, and the advertisement was of the sale of the tenant's goods. Would that privilege the goods of the auctioneer or tenant? I think that there is no such privilege. It would be strange if a tenant could privilege his goods from distress by merely calling in and employing an auctioneer to sell them on the premises. Therefore I think the goods of the tenant would not be privileged. The plaintiff himself asked the auctioneer to put this plate of his into the sale, and the auctioneer accordingly sent the plate from his own premises to Valpy's and put them along with Valpy's goods. They were therefore no more privileged than Valpy's goods.

The case of *Crosier* v. *Tomkinson* (1) is very much in point. There a horse was sent by the plaintiff to an inn, and the innkeeper put *it* into a stable which he had borrowed at a distance from the inn, and it was held that the horse was not privileged from distress by

(1) Barnes, 472; 2 Ld. Ken. 439.

1876

LYONS v. ELLIOTT.

the landlord of the stable. That seems a very analogous case; it was held that the privilege did not extend beyond the privileged premises. But it was said that the owner was not without his remedy, that he might sue the innkeeper.

In the case of *Thompson* v. *Mashiter* (1), it was held that goods on the premises of a factor or a warehouseman had this same privilege, and as long as he occupied, it was immaterial what his occupation was.

In *Brown* v. *Arundell* (2), counsel argued on facts somewhat like, though materially differing from, the present, that the privilege only applied to premises regularly occupied and used by the auctioneer for the purpose of his business; but there the judges held that any occupation by the auctioneer was sufficient, and that the auctioneer was the occupier of the premises; whether rightly or wrongly they held that the auctioneer was de facto occupier of the premises on which he held the auction, and so that the privilege extended to them.

In the present case the auctioneer was in no sense the occupier of Valpy's premises, and though he was exercising a public trade, yet the plaintiff's goods were brought to Valpy's premises and placed among Valpy's goods, and were no more privileged than the rest of the goods, which cannot be privileged merely because the owner has called in an auctioneer to sell them.

LUSH, J. I am of the same opinion. Primâ facie any goods found on the demised premises are distrainable for rent. The law for the benefit of trade makes certain exceptions; thus, implements of trade are not distrainable, if there is other sufficient distress upon the premises; this is a qualified exemption. In other cases, the exemption is absolute, such as arises in the regular course of business. Thus, goods sent to persons exercising a public trade, while they are on the premises in which that public trade is carried on, are privileged from distress for the benefit of trade; such as cloth sent to a tailor, a horse to a farrier, corn to a mill.

But the privilege is attached to the premises for the benefit of trade and extends no further. In this view of the matter the case

(1) 1 Bing. 283. (2) 10 C. B. 54; 20 L. J. (C.P.) 30.

1876

LYONS v. ELLIOTT.

of *Crosier* v. *Tomkinson* (1) has an explicit bearing on the present case; it illustrates the rule and shews the limitation of the privilege. There, "a person who was tenant to defendant gave leave to an innkeeper to make use of his stable (which was at some distance from the inn), to put horses in during the race week. Plaintiff's race-horse was brought to the innkeeper's, and by him placed in the stable which he had borrowed from the defendant's tenant. Defendant distrained the horse for rent due to him from his tenant, and for that the action was brought. The question was whether the horse, under the circumstances, was privileged from the distress, under a notion that this stable was part of the inn.

The Court were clearly of opinion that the privilege of inns did not extend to this stable.

The chief justice said, he thought the owner was not without his remedy, but must come upon the innkeeper, under the implied warranty for safe custody."

I cannot distinguish in principle that case from the present. Here, the plate was delivered to an auctioneer on his premises; so long as it remained on his premises it was privileged; but, as the plaintiff wished, the auctioneer removed the plate to the house of Valpy, and it was put among the goods of Valpy, as to which the auction had been advertised. Then the privilege ceased, for the premises were not the premises of the auctioneer at all, and the plate was in precisely the same position as the furniture of the tenant on whose premises the auction was held. If therefore we were to hold this plate privileged, we must necessarily hold that, as soon as a tenant gets into difficulties he has nothing to do but to call in an auctioneer, and so oust the landlord of his remedy by distress, although he could not remove the goods for the same purpose. That, it seems to me, would be a very strange extension of the doctrine, and one by no means justified either by convenience or authority. I am therefore of opinion, that neither the tenant's furniture nor the plaintiff's plate were privileged, inasmuch as they were on premises not occupied by the auctioneer, and consequently the rule ought to be absolute to enter a verdict for the defendant.

(1) 2 Ld. Ken. 439.

1876

LYONS v. ELLIOTT.

QUAIN, J. On consideration, I agree that the defendant is entitled to succeed. The illustration put by my Brother Lush seems conclusive; the plaintiff's goods cannot have a greater privilege than Valpy's own goods. They were not delivered to the auctioneer in the way of his business, in the sense meant, when it is said the privilege attaches. Valpy merely called in the auctioneer to sell his goods, and it would be very strange if this alone would privilege them from distress. The plaintiff sent his plate, not to be sold by the auctioneer on his premises in the ordinary way of trade, but to be put amongst Valpy's things, to be sold with them, and, consequently, his plate is precisely in the same position as Valpy's furniture. The auctioneer was neither in possession nor occupation of the premises, and the case in Lord Kenyon's reports is therefore almost conclusive of the point.

Rule absolute.

Solicitor for plaintiff: *C. H. Pullen.*

Solicitors for defendant: *Ravencroft, Hills, & Woodward, for Melvill Green, Worthing.*

THE QUEEN *v.* RIPPON AND OTHERS.

Jan. 17.

Election—Local Board—Regular and Casual Vacancy—Distinction of Candidates coming in for different Periods—11 & 12 *Vict. c.* 63, *s.* 13.

Four members of a local board under the Public Health Act (11 & 12 Vict. c. 63) having gone out of office, three at the expiration of their term of office, and one by resignation before the end of his term, four new members were elected at one election without distinction. Neither in the notice of election nor in the voting papers delivered to the electors, was any distinction made between the regular vacancies and the casual vacancy:—

Held, that the election was invalid.

RULE calling upon J. Rippon and three others, to shew cause why an information in the nature of a quo warranto, should not be exhibited against them for acting as members of the local board of health for Newbold cum Dunston, in the county of Derby.

The facts as disclosed by the affidavits were, that the local board for the district of Newbold cum Dunston consisted of nine members, three of whom retired annually on the 25th day of

1876

THE QUEEN v. RIPPON.

March. A member whose term of office would have expired on the 25th of March, 1876, resigned his office on the 26th of February, 1875. Notice was given on the 6th of March, 1875, that an election would be held of four members, the election in case of contest to take place on the 9th of April, 1875. Neither in this notice nor in the voting papers delivered at the residences of the electors, for collection on the day of election, nor otherwise in the election, was any distinction made between the three regular vacancies and the casual vacancy. The four defendants were certified to have obtained the greatest number of votes. The local board, with the consent of the three defendants, who had received the highest number of votes, determined that the defendant who had received the lowest number should fill the casual vacancy.

The rule was granted on the ground that there were only three vacancies for the term of office for which the election was held, and also on the ground that the returning officer arranged the names of the candidates in the voting papers alphabetically, instead of in the order in which the nomination papers were received; but, on shewing cause, the latter ground was not relied on.

Cave, Q.C., and *W. D. J. Foulkes*, shewed cause. The election was duly held; there was no necessity for distinguishing the casual vacancy from the regular vacancies, although the candidate filling the casual vacancy must go out of office sooner than the others. This election was under 11 & 12 Vict. c. 63. (1) If the election had taken place after the passing of the Public Health Act, 1875 (38 & 39 Vict. c. 55), no question could have arisen; for the Act expressly provides by s. 8, sch. 2, Rule 65, that in the event of a casual vacancy being filled up at an annual election, the member elected by the fewest votes shall be deemed elected to fill such vacancy, or if there be no poll, then a member determined by lot. Although no express power was given to the board by the re-

(1) The Public Health Act, 1848 (11 & 12 Vict. c. 63) s. 13, enacts that one third of the members of a local board shall go out of office yearly, and that the order in which the persons first elected shall go out of office shall be regulated by the local board, &c., "and on the days appointed for going out of office a number of persons shall be elected equal to the number of those going out, and so many others as may be necessary to complete the full number of the local board in respect of which the election is to be made."

pealed Acts—except by s. 13 of 11 & 12 Vict. c. 63, with regard to the members first elected (applied in *Howitt* v. *Manfull* (1))— to regulate the order in which members of the board should go out of office, it would be more in accordance with the spirit of the enactments, past and present, to hold that the board had the power than to hold this election void.

[COCKBURN, C.J. Voters may wish a particular candidate, as the less eligible, to serve only for the shorter term.]

The board need not have consulted the electors as to the casual vacancy at all, for, by 21 & 22 Vict. c. 98, s. 24, paragraph 7, it might have filled up the vacancy itself.

[MELLOR, J. But that not having been done, the question arises whether there were any means, after the election, of distinguishing the members who were to go out of office at different times.]

There was no power to hold separate elections; on the contrary, s. 13, of 11 & 12 Vict. c. 63, by its concluding words, shews that there was to be only one election, since the election was to be of "a number equal to the number going out of office, and of so many others as might be necessary to complete the full number of the board." No provision existed for enabling voters to distinguish between the two kinds of vacancy, and any attempt to distinguish them in the election would have perplexed the voters. Sect. 14 recognized vacancy by resignation.

J. C. Bigham (*Herschell, Q.C.*, with him), in support of the rule was not heard.

COCKBURN, C.J. I think the objection to the election fatal. Inasmuch as the candidate elected to fill the vacancy caused by resignation would come in only for the term for which the resigning member would have continued in office, the casual vacancy ought to have been distinguished from the regular vacancies. It is not necessary for us to decide by what means.

MELLOR, J. I am of the same opinion. I am not prepared to say that the four candidates might not have been elected at the same time, but it was essential that by some means distinction should be made between the two kinds of vacancy.

(1) 6 E. & B. 736; 25 L. J. (Q.B.) 411.

1876

THE QUEEN. v. RIPPON.

FIELD, J. I am of the same opinion. The reason of the thing required distinction by some means.

Rule absolute. (1)

Solicitors for relator: *Stevens & Co.*

Solicitors for defendants: *Palmer, Bull, & Fry.*

Jan. 18.

THE QUEEN *v.* JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Statute—Repeal with saving of Things "duly done"—Mistaken Reference in Rate to repealed Act—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 343.

Notice was given by a local board of health of intention to make a rate under the Public Health Act, 1848, and amending Acts. Before the notice had expired these Acts were repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), which contained a saving of "anything duly done" under the repealed enactments, and gave power to make a similar rate upon giving a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed Acts:—

Held, that the rate was valid, the notice being a "thing duly done," and the accidental reference in the rate to the repealed Acts being immaterial to its validity.

RULE calling upon the justices of the West Riding of Yorkshire to shew cause why a mandamus should not issue commanding them to enter continuances and hear an appeal, in which the Elland-cum-Greetland Gas Company were the appellants, and the Elland Local Board of Health were the respondents, touching a general district rate made by the respondents.

Upon the hearing of the appeal the respondents objected, and the justices held that no appeal lay, inasmuch as the rate appealed against was a mere nullity. It appeared that on the 2nd of August, 1875, notice was duly given by the respondents (under 11 & 12 Vict. c. 63, s. 99) of their intention to make a general district rate on Wednesday, the 11th of August; and an estimate was deposited for inspection (as directed by 11 & 12 Vict. c. 63, s. 98) shewing the money required for the various purposes of the rate, "repairs of streets and roads, 410*l.*; salaries, 117*l.*; election expenses, 9*l.*; lighting public lamps, 185*l.*; sinking fund, 205*l.*;

(1) In accord with this decision, see *Reg.* v. *Rowley*, 3 Q. B. 143, 6 Q. B. 668, under 5 & 6 Wm. 4, c. 76, the Municipal Corporations Act.

interest upon loans, 512*l.*; legal expenses, 20*l.*; stationery and printing, 10*l.*;" the rateable value of the property assessable; and the amount in the pound of the proposed rate. On the 11th of August the Public Health Act, 1875 (38 & 39 Vict. c. 55), repealing by s. 343 (1) the previous Acts upon the same subject, the Public Health Act, 1848 (11 & 12 Vict. c. 63), the Local Government Act, 1858 (21 & 22 Vict. c. 98), and the amending Acts, received the royal assent and came into operation. On the same day the respondents, in ignorance of the passing of the Act, proceeded to make a rate, purporting to be a general district rate "for defraying such expenses as are, by the Local Government Act, 1858, charged upon that rate, and such other expenses of carrying into execution the said Acts in the said district as are not provided for by any other rate or chargeable upon the district fund." On the 12th of August the respondents, still ignorant of the passing of the new Act, published a notice of the making of this rate, describing it as a rate for purposes of the repealed enactments. On the 24th of August payment of the rate was demanded of the appellants, and was refused on the ground that they had been overrated. The justices having, as above mentioned, dismissed the appeal, this rule was obtained.

J. B. Maule, Q.C. (*S. Tennant* with him), for the respondents, shewed cause. No appeal lay against the rate, for it was a nullity. The Public Health Act, 1848, and amending Acts, under which the notice of intention to rate was given and the rate purported to be made, having been repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, on the day when the rate was made, the supposed rate was made without any authority. The rate can-

(1) The section contains the following proviso:

"Provided . . . . that this repeal shall not affect

"(*a*) Anything duly done or suffered under any enactment hereby repealed; or

"(*b*) Any right or liability acquired, accrued, or incurred under any enactment hereby repealed; or

"(*c*) Any security given under any enactment hereby repealed; or

"(*d*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; or

"(*e*) Any investigation, legal proceeding, or remedy, in respect of any such right, liability, security, penalty, forfeiture, or punishment, as aforesaid. . . . ."

1876

THE QUEEN v. JUSTICES OF THE WEST RIDING OF YORKSHIRE.

not be treated as a rate under the new Act, for there had not been time when the rate was made for fulfilling the conditions required by the rating clauses, ss. 209–212, of the new Act. Notice of intention to rate is required by s. 210; and further, an estimate of the money required and of the property assessable is required by s. 218.

[FIELD, J. The repealing section contains a saving of acts done. Was not the notice of intention to rate an act done? Was not the estimate an act done?]

The basis of valuation in the estimate required under the new Act is, by s. 211, different from the basis of valuation under the former enactments, ss. 55, 56 of the Local Government Act, 1858; under the new Act the value is to be ascertained by the valuation list, if any, while under the repealed enactments the value is to be ascertained by the poor-rate, if any, unless the board think a valuation list a better criterion. The purposes to which the rate can be applied are no doubt substantially the same. Although the affidavits do not shew what mode of valuation has been adopted, the valuation was in fact based upon a valuation list. *Milward* v. *Caffin* (1) and *Reg.* v. *Wavell* (2) shew that the rate was not merely irregular but a nullity.

M. W. Whitaker (*J. Forbes* with him), for the appellants, in support of the rule. The rate was a valid rate, against which there was a right to appeal. The rate would have been good as a rate under the repealed enactments, if the repeal had not taken effect till after the rate had been demanded; and it would have been good beyond dispute as a rate under the new Act if the new Act had come into effect before the notice of intention to rate was given. That being so, the saving in the repealing section of things "duly done" is sufficient to support the rate as a rate under the new Act. As to the estimate required by s. 218, that section, by its concluding words, expressly enacts that the validity of the rate is not to be affected by it.

COCKBURN, C.J. The question before us arises upon an appeal to quarter sessions against a rate made by the Local Board of Health of Elland. The board intending to make a rate under

(1) 2 W. Bl. 1330. (2) 1 Doug. 116.

1876

THE QUEEN v. JUSTICES OF THE WEST RIDING OF YORKSHIRE.

the Public Health Act, 1848, and amending Acts, gave the notice required by those Acts. But, before the time had expired for making the rate in accordance with the notice, the Acts were repealed by the Public Health Act, 1875. The board, nevertheless, in ignorance of the passing of the Act, proceeded to make the rate which they had given notice of their intention to make, and it is as to the goodness of that rate that we have to decide. It is to be observed that the purposes of the rate are substantially the same under the new and the old Acts, and that the notices of intention to rate are also substantially the same, and it has not been disputed that the notice actually given, if it had been given under the new Act, would have been good. Then there is the saving clause excepting from the repeal things done. Although my mind has fluctuated during the argument, I am of opinion that the rate was well made, and that the quarter sessions ought to have entertained the appeal. If there had been no saving clause, the case would have presented a different aspect, but the notice of intention to rate was, I think, a "thing done" within the meaning of the saving clause.

MELLOR, J. I have come to the same conclusion for nearly the same reasons. It would be strange if we were compelled to hold this rate invalid. The rating authority is, by the effect of s. 326 of the Act of 1875, the same, and the rate was one which the board had full power to make, unless it was precluded by the want of notice of the intention to make it. Sect. 210 of the Act of 1875 enacts that "public notice of intention to make any such rate, and of the time when it is intended to make the same, and of the place where a statement of the proposed rate is deposited for inspection, shall be given by the urban authority in the week immediately before the day on which the rate is intended to be made, and at least seven days previously thereto." I think that the notice given under the repealed Acts practically satisfied all the requirements of that section, and, although I have had doubts during the course of the case, I have come to the conclusion that the rate is good.

FIELD, J. I have come to the same conclusion. The rate is made for purposes for which it may lawfully be made under s. 210

1876

THE QUEEN. v. JUSTICES OF THE WEST RIDING OF YORKSHIRE.

of the Act of 1875, and by an authority competent to make it. It is said, nevertheless, to be a nullity, because the board has proceeded under the repealed enactments. And, no doubt, if the purposes of the rate were different under the repealed Acts and the new Act, there would be some ground for objecting that this rate, being founded upon the estimate made under the repealed enactments, cannot be treated as a rate under the new Act; but that is not the case. I think, therefore, that so far as the estimate is concerned, the rate is good as a rate under the new Act, the estimate being a "thing duly done," within the meaning of the saving clause. And substantially the same observations as those which apply to the estimate seem to me to apply to the notice itself of intention to rate. In consequence of the fluctuations constantly taking place in the body of ratepayers it is, as everyone knows, desirable that rates should be levied quickly, and it would, therefore, be a decidedly inconvenient state of the law if this rate must be held bad for the reasons which have been alleged. The purposes of the rate should, no doubt, be stated in the rate: *Reg.* v. *Wavell* (1); but as it appears that all the purposes of the rate are legally proper objects, the fact that, per incuriam, the board has referred to a wrong Act ought not to be held to invalidate it.

Rule absolute.

Solicitors for appellants: *Torr, Janeway, Tagart, & Co., for Lancaster & Wright, Bradford.*

Solicitors for respondents: *Williamson, Hill, & Co., for Norris, Foster, & England, Halifax.*

(1) 1 Doug. 116.

HUDSON *v.* TABOR.

1876
Jan. 18.

Sea-wall, Liability to repair—Water passing through Defendant's Land into that of adjoining Proprietors—Prescription—Evidence.

The plaintiff was the occupier of land and the defendant the proprietor of adjoining land fronting to a creek communicating with the sea. It was necessary that each proprietor having land fronting the creek should maintain a sea-bank or wall to keep out the sea, and such a sea-wall had been maintained upon the creek time out of mind. The wall protecting the plaintiff's land was continuous with that protecting the defendant's land, and the level of the defendant's land was higher than that of the plaintiff. These walls have a tendency to gradually subside, and it becomes necessary from time to time to raise them to the proper height by placing fresh materials on the top. Owing to an extraordinarily high tide, the water flowed over the defendant's wall, and spread not only over his land but also over the land of the plaintiff, doing considerable damage. In an action to recover the amount of the damage, the jury found that the mischief had happened through the defendant's neglect to keep his wall at the proper level:—

Held, first, that the mere fact, that each frontager had always maintained the wall in front of his own land, and that no one had thought it necessary to erect a wall or bank to protect himself from the water coming from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall not only for his own protection but for that of the adjoining landowners; secondly, that by the common law, apart from prescription, no such liability was cast on the defendant.

Affirmed 2 QBD. 290 C.A.

DECLARATION, that plaintiff was occupier of land and of portion of a sea-wall upon it, and that W. Cockerton was the occupier of other land and of another portion of the sea-wall, as tenant to the defendant, the reversion belonging to the defendant, which land and sea-wall abutted upon the land and sea-wall of the plaintiff, by reason whereof the defendant was entitled to have the defendant maintain and repair, and keep maintained and repaired, the sea-wall of which Cockerton was possessed, for the protection of the lands of the plaintiff from the water in a creek contiguous to the sea-wall. Breach: that the defendant did not maintain, repair, &c., the sea-wall, by reason whereof large quantities of water flowed through and over the land of which Cockerton was possessed, into, upon, and over the lands of the plaintiff, by reason whereof the water in ditches, brooks, wells, and ponds of

1876

HUDSON v. TABOR.

the plaintiff in his land was rendered salt, brackish, and unfit to be drunk by men or cattle, and the plaintiff was compelled to make a forced sale of his cattle and stock upon his land, and the herbage, corn, &c., upon his land were spoilt, &c., &c.

There were other counts charging a breach of duty in not keeping the sea-wall high enough to exclude the tide, &c.

Pleas: That plaintiff was not entitled to have the sea-wall maintained, &c.

Joinder of issue.

At the trial before Denman, J., at the Essex spring assizes, 1875, it appeared that the plaintiff was tenant from year to year of a farm of about 500 acres, called Barling Hall Farm, near Rochford in Essex, and bounded on the south by another farm belonging to the defendant, called Baldwin's Farm, and let by him to one W. Cockerton. Both the farms abutted eastward upon a creek called Barling Creek communicating with the sea. The land in each farm sloped in a north-westerly direction, the defendant's land being considerably higher than the plaintiff's. Part of the plaintiff's and also of the defendant's land lay below the level of ordinary high tides, and for the necessary protection of the land a sea-wall or earthern embankment had been constructed along the eastern line of the plaintiff's and defendant's premises. This wall passed continuously from the plaintiff's to the defendant's land. Evidence was given that a sea-wall had been maintained there, and in adjoining districts exposed to the tide, beyond living memory, and that such walls have a tendency to flatten and settle down year after year through cattle grazing upon them and other causes, and that it is necessary occasionally to raise them, or, as it is called, to top them. There was contradictory evidence as to whether the defendant's wall was kept to a proper height. On the 20th of March, 1874, there was an extraordinarily high tide, and a large body of water flowed over the defendant's wall and then made its way from the defendant's into the plaintiff's land, doing considerable damage.

The plaintiff's counsel proposed to ask one of the witnesses whether there was a well-known custom in the Rochford Hundred as to the person who is liable to repair a sea-wall where the wall

is not subject to the jurisdiction of a commission of sewers, but upon objection the question was withdrawn.

At the close of the plaintiff's case, it was objected that there was no evidence of any obligation on the part of the defendant to repair the wall. The learned judge refused to stop the case, and ultimately left to the jury the question, whether, supposing the mischief was caused by water flowing from the defendant's land, it was owing to negligence in the maintenance of the wall by the defendant. The jury found a verdict for the plaintiff, leave being reserved to the defendant to move.

A rule was obtained accordingly, calling upon the plaintiff to shew cause why the verdict should not be set aside and entered for defendant, on the ground that there was no evidence of obligation on the part of the defendant to repair or maintain the sea-wall fronting Baldwin's farm as between himself and the plaintiff, the Court to draw inferences of fact from the judge's notes; and in the event of the Court holding that there was no such evidence, but that such evidence of custom was admissible, why a new trial should not be had, as though the learned judge had rejected the evidence; also why a new trial should not be had on the ground that the verdict was against the weight of evidence.

1875. Nov. 3, 8, 10. *Thesiger, Q.C.*, and *F. M. White*, shewed cause, citing *The Isle of Ely* (1); *Rooke's Case* (2); *Keighley's Case* (3); *Henley* v. *Mayor of Lyme Regis* (4); *Mayor of Lynn* v. *Turner* (5); *Rex* v. *Commissioners of Essex* (6); *Rex* v. *Commissioners of Somerset* (7); Callis on Sewers, p. 114; Magna Charta, cc. 15 & 16; Fitzherbert, Nat. Brev. 113; Woolrych on Sewers, p. 4; *Morland* v. *Cook*. (8)

Nov. 10, 20. *Day, Q.C., Philbrick, Q.C.*, and *H. Curtis Bennett*, in support of the rule, cited *Reg.* v. *Bamber* (9); 23 Hen. 8, c. 5, s. 3; *Rex* v. *Commissioners of Pagham* (10); *Reg.* v. *Overseers*

(1) 10 Co. Rep. 141 a.
(2) 5 Co. Rep. 99 b.
(3) 10 Co. Rep. 139 a, 140 b.
(4) 5 Bing. 91, 100, 108, 113; 1 Bing. N. C. 222.
(5) 1 Cowp. 86.
(6) 1 B. & C. 477.
(7) 8 T. R. 312.
(8) Law Rep. 6 Eq. 252.
(9) 5 Q. B. 279.
(10) 8 B. & C. 355.

1876

HUDSON v. TABOR.

of Vange (1); 18 Edw. 3, f. 23; *Reg.* v. *Warton* (2); *Reg.* v. *Leigh.* (3)

The nature of the arguments sufficiently appears in the judgment.

Cur. adv. vult.

1876. Jan. 18. The judgment of the Court (Cockburn, C.J., Mellor and Quain, JJ.) was delivered by

COCKBURN, C.J. The facts of this case, so far as is necessary to our decision, lie in a narrow compass. The plaintiff is the occupier and the defendant the proprietor of adjoining lands fronting to a creek communicating with the sea, and in which the tide flows and re-flows. To prevent the water at high tides from overflowing and inundating the lands, it is necessary that each proprietor having land fronting the creek should maintain a sea-bank or wall to keep out the sea, and there is no doubt that such a sea-wall has been maintained upon this creek and other creeks in the neighbourhood time out of mind. It appears that these walls, from the tread of cattle, and of persons passing along them, or from other causes, have a tendency gradually to subside, sometimes to the extent of from two or three inches in a year, and it becomes necessary, from time to time, to raise them to the proper height by placing fresh materials on the top, or as it is called "topping" them. According to the evidence the usual course has been, whenever a tide was found to rise at any part to the level of the top of the wall, or within a few inches of it, for the proprietor to proceed to "top" the wall to the height of fifteen inches or more.

On the 20th of March, 1874, an extraordinarily high tide occurred. The water flowed over the defendant's wall, and spread not only over his land, but also over the land of the plaintiff, part of which was on a lower level than that of the defendant, doing very considerable damage. And it is to recover compensation for the damage thus occasioned that this action is brought.

We must take it upon the finding of the jury, with which we see no reason to quarrel, that the defendant had neglected to keep

(1) 3 Q. B. 242. (2) 2 B. & S. 719; 31 L. J. (Q.B.) 265.
(3) 10 Ad. & E. 398.

(2) 32 L J M.S. 325

his wall to the proper level, and that through his default in this respect, the mischief was caused. Hereupon arises the question whether the defendant was bound to maintain the wall, not only for his own protection, but also for that of the owners of the adjoining lands, upon the answer to which depends, of course, the question of his liability in the present action.

The grounds on which the liability of the defendant is sought to be established are, first, prescription; second, the alleged liability at common law of every owner of land fronting the sea, or any estuary or creek liable to be flooded by the sea, to maintain a sea-wall for the purpose of keeping out the sea water from the adjoining lands.

That an owner of land fronting the sea may be bound by prescription to maintain a bank or wall to keep out the sea water for the protection of the owner of the adjoining land, is abundantly shewn by the authorities cited in the course of the argument. But whether such a prescriptive obligation exists on the part of the frontager to maintain the sea-wall for the protection of the adjoining owners as is here contended for must, of course, depend on the evidence adduced in the cause; and we are called upon to say whether there is sufficient evidence to warrant the finding this issue for the plaintiff. Now the evidence amounts to no more than this, namely, that each frontager has always maintained the wall in front of his own land, while no one has thought it necessary to protect himself against the possible consequences of the neighbours' neglect, by erecting a bank or wall to keep out the water which might come to him from the neighbours' land, if the latter neglected to maintain the wall and his land became flooded in consequence.

In our opinion this evidence, when taken in connection with the fact that what each owner has done has been no more than was necessary for his own protection, or than what he would have done along the whole of the shore had he been the owner of the whole of the land fronting the water in question, is insufficient to support the alleged prescription. The case is manifestly very different from what it would have been if the wall maintained by the defendant had been on the plaintiff's land instead of his own. The fact that something which a man does for his own benefit may

1876

HUDSON v. TABOR.

incidentally benefit his neighbours is not, we think, sufficient to warrant the inference that he has bound himself to continue to do the thing in question, so as to render him liable in damages if he omits to do it. In the absence of all other evidence of liability, it appears to us more reasonable to refer what has been done to a regard to the proprietor's own interest than to any obligation he has taken upon himself towards another. Nor will the length of time during which the given state of things may have continued add anything to the force of the reasoning. The motive for maintaining the wall remaining the same throughout, will equally account for the fact and rebut the presumption of prescriptive liability which might otherwise arise. It is said, indeed, that as it was for the common benefit of all that each owner should make good and maintain the wall fronting his own land, that so the water might be kept out from the lands of all, it is reasonable to infer that from early times an arrangement had been come to by all that each man should make and maintain his wall for the common benefit of all; and that out of this compact, acted upon and matured by time, the prescription in question has arisen. But the assumption here made, though it might well explain the prescription if there were any evidence of the latter, is altogether speculative, and, it is further to be observed, assumes the existence of the prescription of which the proof appears to us to fail. If, indeed, there was any evidence of the claim of one owner to have the wall of another kept up for his benefit having been asserted adversely, and of such claim having been acquiesced in and submitted to, the case would be different. But no such evidence was offered. And though it is true that each owner has always had the benefit resulting from the wall of his neighbours, the presumption of an easement having been acquired, which otherwise might thence arise, becomes neutralized by the opposite presumption that the wall, which was absolutely essential to the safety of the owner maintaining it, was kept up by the latter with a view to his own immediate interest alone.

Nor does it appear to us that the omission of the frontage owners to adopt measures to protect themselves against the possible consequences of the neglect of their neighbours to keep up their walls adds materially to the strength of the argument in favour

of prescription, the probability being that each owner has naturally relied on his neighbours doing that which their own interest, and a regard to the safety of their own property, obviously required. Under these circumstances it appears to us that the facts do not warrant the inference of a prescriptive obligation to keep up the wall for the benefit of the adjoining occupiers.

But it is said that independently of prescription every owner of land fronting the sea, and liable to be overflowed by it, is at common law bound to keep out the sea for the protection of the adjoining owners as well as his own, and is, the matter being one of public concern, liable to make good any damage which may arise to them from his neglect to fulfil this obligation. But for this position, no sufficient authority is, as it appears to us, to be found. The case from the Year Books, 18 Edw. 3, f. 23, cited in the argument before us, does not establish the liability at common law contended for. For, although in the reference to that case in *Keighley's Case* (1) Lord Coke adds that the reason of the decision in favour of the plaintiff, that the defendants should make good the wall, "was pro bono publico, for salus populi est suprema lex," when the report in the Year Book comes to be looked at, it will be found that the case turned on whether there was an obligation to repair by prescription, the issue being expressly stated to have been whether the tenants of the land had not repaired "de tout temps," and it was found for the plaintiff. The case is, therefore, no authority for saying that independently of the prescription the defendant would have been liable merely as being a frontager to the sea.

Callis, indeed (p. 115), speaks of "frontage" as a ground of liability. But his language is vague, and his only authority is a case from the Liber Assizorum in the 37 Edw. 3. After describing what is meant by frontage, he says, "And in 37 Lib. Assiz. pl. 10, it seems that the frontagers are bound to the repairs; and in 8 Hen. 7, he whose grounds are next adjoining to a highway is bound to repair the same. And by these cases there is no difference touching repairs of the high streams and the highways in my opinion." He then goes on to say, "The ownership of a bank, wall, or other defence is a sufficient warrant to impose the charge

(1) 10 Co. Rep. 139 b.

1876

HUDSON v. TABOR.

of the repairs thereof upon him without being tied thereto by prescription, as appears in 8 Hen. 7, fol. 5, and it stands with reason that every man should be bound to repair his own, and the consideration is also moving, for that his grounds which lie nearest the waters are soonest subject to drowning, and if any increase be upon the small rivers, it falls to his share."

This reasoning is far from conclusive, and the case in the 37 Liber Assiz. pl. 10, falls very far short of shewing that the defendants in the case there reported were liable to repair as frontagers. A commission had issued to inquire concerning a stream or watercourse. The word in the report is "rival," which, according to Du Cange has two meanings, that of a river bank or shore, and that of a stream or watercourse; the context shews clearly that the word is used in the latter sense, for it goes on to state that the stream had become stopped, to the nuisance of the neighbourhood, and the commissioners were to inquire by whom and through whose default the stoppage was occasioned. And upon inquisition held, the finding was that the stoppage was caused by the watercourse not having been cleaned out since the plague, and that it had not been cleaned out within time of memory, and that there was no one who of right ought to clean it out. But the inquisition further found that the Abbot of D. had the lordship of one half of the water, and the Earl of H. that of the other, and that they had a piscary therein, and that four townships, naming them, had a right of passage through the river as their easement. And this inquisition being brought into the King's Bench, and a writ having been issued to bring the abbot, and earl, and the four townships before the Court, to shew cause why they did not clean out the watercourse, the abbot and earl submitted that they ought not to be charged therewith, as it had been expressly found that no one was bound to repair it, or if any one was bound, it should be the townships which had a common passage along the water. But Green, J., answers, "You do not deny that you have the piscary, and if it had been found that the townships had not a passage through the river, surely you two should be charged with the whole duty of cleaning out the watercourse." So that it would seem that, while *by reason of their right of passage the townships were liable* to contribute their share, the abbot and the

2 QBD 293

earl were held liable on account of their ownership in the water, and their right of piscary in the water. There is nothing to shew that they were deemed liable on account of their having land fronting the water, or, indeed, that such was the case, nor does it appear that the subject-matter of the inquiry was a wall or bank fronting a river. The case is therefore no authority for the position that the owner of a wall fronting the sea or a tidal river is liable at common law to repair. When the case in 8 Hen. 7 comes to be looked at, it amounts only to this, that he who has a ditch adjoining a high road is bound to keep the ditch in a proper condition, to prevent it overflowing the road and causing a nuisance—a case by no means analogous to the present.

Callis, it is true, shews also (supported herein by the authority of Lord Coke in the case of the *Isle of Ely* (1)) that from a very early period, and prior to any of the Statutes of Sewers, the king, who by the prerogative of the crown had power to see to the defences of the realm, issued, on more than one occasion, commissions to inquire into the state of the sea-walls and other defences against the sea in particular districts, and where such sea-walls or other works were found defective, to order their repair and to make ordinances for their future maintenance, assessing to the expense of the work, not only the party to whom the land fronting the sea belonged, but all who derived benefit from the work. The forms of such commissions are to be found in Fitzh. Nat. Brev. p. 113.

The statutes relating to sewers, and authorizing the issuing of such commissions, beginning with 6 Henry 6, c. 5, were, in fact, only confirmatory of the common law, except in so far as they enlarged the powers of the commissioners who were empowered by them to order the construction of new works as well as the repairs of ancient ones. Under these commissions every one is to contribute who may receive benefit or suffer loss—obviously a very different thing from throwing the whole burden on the frontager, and making him liable for all the damage that may result from his omission to keep up the sea-wall.

The equitable principle on which the assessment under such a commission is based is in itself a strong argument against the

(1) 10 Co. Rep. 141 a.

1876

HUDSON v. TABOR.

position that the frontager is liable at common law. He may have only a narrow slip of land of comparatively little value, while behind him may be a proprietor having much more land and of greater value lying on the same or a lower level, and liable to be overflowed if the sea-wall is imperfect. It is obvious that the last owner ought, to some extent at least, to bear his share of the cost of maintaining the defences against the sea.

We think, therefore, that the fact, that the owner of land fronting the sea might be made liable under a commission issued by virtue of the king's prerogative, by no means tends to shew that independently of a royal commission such liability existed at common law, and we see nothing to warrant our holding it to exist. The proper remedy in such a case as this is to procure the issuing of a commission in which by an equitable adjustment the interests of all parties may be secured. Our judgment will therefore be for the defendant.

Judgment for the defendant.

Solicitor for plaintiff: *J. Hudson.*
Solicitors for defendant: *Beaumont & Warren.*

Jan. 16.

COLEBECK *v.* THE GIRDLERS COMPANY.

Lessor and Lessee—Right to support—Remedy of Lessee against Lessor—Implied Covenant—Nonfeasance—Party Wall.

The defendants were the owners of two houses in a street, numbered 38 and 40, and of a gateway under 40 and adjoining 38. In 1857 they demised the house No. 38 for a term of twenty-one years, the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises. In 1865 they granted a lease to the plaintiff of the house No. 40 for a term of eleven years, subject to a similar covenant to repair walls and party walls. The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway and the house No. 38 to the height of the first floor. The house of the plaintiff, No. 40, was built so as to extend in part over the top of the gateway and to rest upon this party wall between the gateway and the house No. 38, and to be supported by it. The plaintiff's covenant to repair did not extend to this wall, and there was no covenant by the defendants to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to the failure of support

from the party wall, which had bulged in consequence of the pressure upon it from the plaintiff's premises:—

Held, that there was no implied covenant on the part of the defendants to support the plaintiff's premises, although it might be an answer to an action upon the plaintiff's covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of the defendants.

ACTION to recover damages in consequence of the failure of the defendants in an alleged obligation to maintain a wall supporting the plaintiff's house.

The following case was stated by consent of the parties.

1. The plaintiff is a boarding-house keeper, and in February, 1874, carried on business as such at No. 40, Basinghall Street, in the city of London.

2. The defendants are the Girdlers Company of the city of London, and their hall and offices are situate at Girdlers Hall, which stands behind certain of the houses forming the east side of Basinghall Street, and the entrance to which is by a gateway from Basinghall Street.

3. The house No. 38, Basinghall Street, stands on the south side of the gateway which forms the entrance to the Girdlers Hall, and it was, at the time of the alleged grievances, in the occupation of one Smith, who was assignee of a lease from the defendants, the freeholders, such lease being made on the 20th of August, 1857, for a term of twenty-one years from midsummer, 1857, and containing covenants and clauses the same in terms with those of the lease under which the plaintiff holds No. 40, as hereinafter mentioned.

4. The defendants are also the freeholders of No. 40. The north wall of No. 38, from the top down to the level of the first floor, is also the south wall of No. 40, and is in the occupation of the tenants of Nos. 38 and 40. Below the level of the first floor this wall does not form any part of the house No. 40, but separates No. 38 from the gateway and entrance to the defendants' hall and premises, and is in the occupation of the tenant of No. 38 and the defendants. The gateway and entrance are bounded on the north side by a wall separating them from the ground floor of No. 40 (this wall being in the occupation of the tenant of No. 40 and the defendants), and are situate under the first floor of No. 40, which at this part has no ground floor.

1876

COLEBECK v. GIRDLERS CO.

5. There is thus no house No. 39. But up to the first floor the space, which would otherwise be filled by No. 39, is occupied by the defendants' gateway and entrance and the above-mentioned walls and other work thereof, running the whole depth of No. 40 at this part, and giving access to the defendants' premises behind.

6. The house No. 40, so far as regards the ground floor, stands on the north side of the defendants' gateway and entrance. But from the first floor upwards it includes not only the floors standing over the part of the house so adjoining to the defendants' gateway and entrance, but also the floors standing over the defendants' gateway and entrance. (1)

7. The gateway and entrance, which thus occupy the space between the ground floors of Nos. 38 and 40 and under the first floor of No. 40, are in the exclusive occupation of the defendants. In front is a gate opening on Basinghall Street, which is opened and shut at the pleasure of the defendants. Within the gate is an ornamental arch of woodwork, extending the whole depth of the space in question, and concealing from view the walls on either hand and the joists and flooring of the first floor of No. 40 overhead. The woodwork of this arch, which was erected and is maintained by the defendants, is secured in some places, and has been secured in others by fastenings into the walls on each side. This arch affords no support to the superincumbent buildings.

8. All the said premises and the arch of woodwork were erected as above described at the same time, about 200 years ago, and were then and have been ever since the freehold property of the defendants.

9. By deed bearing date the 21st day of December, 1865, and which was duly executed by the plaintiff and by the defendants, the defendants demised to the plaintiff the house, No. 40, Basinghall Street, for the term of eleven years and one quarter from the 25th day of December, 1865, at a yearly rent of 75*l.*

10. The lease contains a covenant by the tenant in the following terms:—"And further, that he, the said William Colebeck, his executors, administrators, and assigns, shall and will at his and their own costs and charges, at all times during the term hereby

(1) And also, as appeared from a plan attached to the case, the floors over part of the first floor of the house No. 41.

granted, well and sufficiently repair, uphold, sustain, maintain, paint, paper, glaze, tile, slate, lead, purge, amend, and keep the said messuage or tenement and premises hereby demised, and all pavements, party and other walls, fences, pipes, gutters, watercourses, waterclosets, sinks, drains, and appurtenances belonging, or to belong, thereto, in, by, and with all needful reparations, upholdings, cleansings, and amendments whatsoever as often as occasion shall require (damage by fire excepted), and particularly that he, the said William Colebeck, his executors, administrators, and assigns, shall and will in every third year of the term hereby granted, at his and their own costs, well and sufficiently paint, or cause to be painted, twice over in good oil colour, all the external wood and iron work of and belonging to the said hereby demised premises.

11. No. 40 and the adjoining premises and gateway had been since their erection, were at the date of this lease, and have been ever since, constructed and occupied as described in the 2nd, 3rd, 4th, 5th, 6th, and 7th paragraphs of this case. It was manifest and known to the plaintiff and the defendants that the portion of No. 40 above the defendants' gateway and entrance depended for support upon the portion of wall separating the defendants' gateway and entrance from No. 38, but this portion of wall did not form part of the premises demised to the plaintiff.

12. On the 14th of February, 1874, it was discovered by the plaintiff that the walls of that portion of No. 40 which is above the defendants' gateway and entrance were giving way, and this went on till the 16th of March, 1874, on which day the plaintiff was compelled to dismiss his boarders and remove elsewhere in consequence of the insecure condition of the house.

13. The damage to the plaintiff's house mentioned in paragraph 12 was caused by the failure of the support afforded to it by the wall on the north side of No. 38, below the level of the first floor. This portion of the floor had split internally and bulged in consequence of the pressure upon it from above of the plaintiff's premises and the defective quality of its brickwork. This splitting and bulging must have been going on for a considerable time before the 14th of February, 1874, and had gradually increased, but no one was aware of it until that day, and only an expert

1876

COLEBECK v. GIEDLERS CO.

would have discovered its existence by examination of the wall. The effect of this splitting and bulging might at any time have been ascertained on an inspection by a surveyor or other expert of the wall from the ground floor and basement of No. 38, which the defendants had power to enter for such a purpose under the lease. It might also have been ascertained by a surveyor or other expert on removing the woodwork of the arch upon the defendants' side of the wall. No such inspection has been made on behalf of the defendants. The age of the wall was known to defendants, but nothing had occurred to lead them to suspect that the wall was unsound.

14. Had the splitting and bulging, in the 13th paragraph mentioned, been discovered at an earlier date all damage to the plaintiff's house might have been prevented. The defendants repaired the wall with all diligence as soon as they became aware that it was giving way. At the same time they made good the wall above the level of the first floor, and claimed to be repaid by the plaintiff the expenses of this part of the work.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover against the defendants in this action.

1875. Nov. 9. *A. Wilson* (*Routh* with him), for the plaintiff. Having regard to the terms of the lease and the situation of the premises, there was an implied covenant by the defendants to maintain the party wall between the defendants' gateway and the house in Smith's occupation. The plaintiff cannot fulfil his covenant to repair while the wall in question is in a dilapidated and insecure condition, and the defendants must contend that they are at liberty to sue for a breach of contract which is caused by a wrongful omission on their part. It was evident when the lease was granted, that, unless this wall was maintained in statu quo, the plaintiff could not comply with his covenant; and there can be no stronger ground for inferring that the defendants agreed to maintain the wall as might be necessary. A different construction will have the effect of making a covenant to repair part of a house a covenant to repair the whole. It may be contended that the default will only afford an answer to an action against the plaintiff for breach of his covenant to repair. But it can only be an answer to such an action if it amounts to breach of some implied contract

on the defendants' part. *Pomfret* v. *Ricroft* (1), so far as it has any bearing on the present case, is in favour of the plaintiff. There there was a lease of a house with right to use a pump standing upon a piece of land excepted from the lease, and it was held by the Exchequer Chamber that no action, in the absence of express covenant, lay against the lessor for the mere non-feasance in not repairing the pump. But it was assumed by the Court below as law, that "if a man demise by deed a middle room in a house and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor." And the opinion of Twysden, J., which was adopted by the Exchequer Chamber, was founded upon the assumption that the lessee might himself have repaired the pump, and had an implied licence to go on the lessor's land for that purpose. Here the wall in question is a party wall, and the plaintiff's covenant to repair gives him no right to interfere with it. *Rider* v. *Smith* (2) and *Knight* v. *Gravesend Waterworks Co.* (3) are authorities in favour of the obligation.

Philbrick, Q.C. (*R. E. Webster* with him), for the defendants. There is nothing in any rule applying to the construction of leases by which the covenant claimed by the plaintiff can be implied. It is well established that there is no implied covenant or promise on the part of a lessor of a house that it is reasonably fit for habitation, or that the house will endure during the term, or that the lessor will do any repairs whatever: *Gott* v. *Gandy* (4); *Sutton* v. *Temple.* (5) The defendants suffer the same hardship as the plaintiff. They have no control over this party wall, which passed under the demise to Smith, and they cannot be charged with negligence in making such a demise. If the defendants had been guilty of any act by which the support afforded by the wall was affected, the case might be different, but they are charged with a mere omission to repair. In the notes to *Pomfret* v. *Ricroft* (1) this distinction is pointed out. It is there said, that the maxim, Sic utere tuo ut alienum non lœdas, almost always applies to some act which is done by one man to the prejudice of

(1) 1 Saund. 322; Wms. Notes, 569.
(2) 3 T. R. 766.
(3) 2 H. & N. 6; 27 L. J. (Ex.) 73.
(4) 2 E. & B. 845; 23 L. J. (Q.B.) 1.
(5) 12 M. & W. 52.

(4) 5 C. B. (N.S.) 810

1876

COLEBECK v. GIRDLERS CO.

another, and reference is made to the dictum of Parke, B., that if the owner of a house granted an upper room, with a reservation of the lower room, he would be liable to an action of covenant if he were to remove the supports of the upper room: *Harris* v. *Ryding*. (1) The same distinction between active interference and passive omission is taken in cases between the owner of a mine and the owner of the surface: *Caledonian Ry. Co.* v. *Sprott*. (2) The plaintiff has failed to provide in the lease for this contingency, and must take the consequences. [He also cited *Alston* v. *Grant* (3); *Ross* v. *Fedden* (4); Gale on Easements, 3rd ed. pp. 426–429, 4th ed. p. 478, note.]

Wilson, in reply, cited *Cubitt* v. *Porter*. (5)

Cur. adv. vult.

1876. Jan. 16. The judgment of the Court (Cockburn, C.J., Mellor and Quain, JJ.) was delivered by

MELLOR, J. In this case we are of opinion that our judgment should be for the defendants.

There is very little authority directly bearing on the case, and our attention was carefully called to all that is to be found on the subject.

The Girdlers Company are the owners in fee of three several houses fronting into Basinghall Street in the city of London, being Nos. 38, 40, and 41, and are also the owners of a large gateway fronting to the street, and forming the access to the hall and other premises belonging to such company. The house No. 38 had, on the 20th of August, 1857, been demised for a term of twenty-one years, and was before and at the time of the action and of the commission of the alleged grievances by the defendants in the occupation of a person named Smith, as assignee of such lease, who was bound by the covenants therein to repair all walls and party walls thereto belonging. On the 25th of December, 1865, a lease was granted by the defendants to the plaintiff of the house No. 40, which was then in his occupation for a term of eleven years, subject to similar covenants for repair of walls and party

(1) 5 M. & W. 60; 71.
(2) 2 Macq. 449.
(3) 3 E. & B. 128; 23 L. J. (Q.B.) 163.
(4) Law Rep 7 Q. B. 661.
(5) 8 B. & C. 257.

18 Jur 332

walls, as in the lease before mentioned to have been made to Smith.

It was agreed by the counsel that the wall on the south side of the gateway, separating it from No. 38, was a party wall between the gateway and the house No. 38 to the height of the first floor.

The house of the plaintiff, being No. 40, was in part built on the level of the street, having an outer door into Basinghall Street; but as to the residue, was built so as to extend in part over and above the first floor of the house No. 41 (1) and in part over the top of the said gateway to Girdlers Hall, and to rest on the south side upon the said party wall between the gateway and the house No. 38, and was on that side built so as to depend for support on such party wall, and was on that side supported by it, which wall, higher up and above the level of the gateway was the party wall between the plaintiff's house and house No. 38 in the occupation of Smith.

There was a covenant in the plaintiff's lease to repair walls and party walls, but it was admitted that it did not extend to the wall dividing the gateway from No. 38, neither was there any covenant by the defendants to keep that party wall in repair or to maintain it as a support to the plaintiff's house. The several houses and premises were all erected about 200 years ago, and have always since been the property of the defendants. On the 14th of February, 1874, the plaintiff discovered that the walls of that portion of No. 40 which was above the said gateway of the defendants were giving way, and they continued to do so until the 16th of March following, when the plaintiff, who kept a boarding house, was compelled to dismiss his boarders and to remove elsewhere in consequence of the insecure condition of his house, No. 40. The damage to the plaintiff's house was occasioned by the failure of the support heretofore afforded by the party wall between the defendant's gateway and the house No. 38. That wall had split internally and bulged in consequence of the pressure upon it from the plaintiff's premises and the defective quality of the brickwork.

The plaintiff brought his action against the defendants to recover damages sustained by reason of the failure, as he alleged, of the

(1) This is not stated in the case, but appeared from a plan attached to it.

1876

COLEBECK v. GIRDLERS CO.

defendants efficiently to support the house so demised by them to him.

The question which we have to decide is whether, in the absence of an express covenant, there is, under the circumstances of the case, any implied covenant or grant on the part of the defendants to support and maintain the wall in question, so as to prevent any sinking, or bulging, or other structural injury to the plaintiff's house by reason of the failure of such wall.

It was contended on the part of the plaintiff that, considering the peculiar character of the structure of the plaintiff's house, there must necessarily be implied in the demise to him, a grant or covenant on the defendants' part that they would by means of such wall efficiently support, during the term, the plaintiff's house, so as to prevent injuries of the character which did in fact happen to it; and he further contended that this must be so in a case in which the plaintiff had covenanted with the defendants to repair and keep in repair the house so demised to him, which it was impossible for him to do, unless the defendants efficiently supported the wall on which it in great measure rested.

It was contended by the other side that there was no such implied grant or covenant as was asserted on the part of the plaintiff's counsel, and that it did not differ from the case of the demise of an ordinary house, in which no obligation rests on the landlord to do substantial repairs, even after notice that the condition of the premises was dangerous: *Gott* v. *Gandy* (1), *Pomfret* v. *Ricroft* (2), per Twysden, J., whose reasons and opinions, having been overruled in the Court below, were supported by the Exchequer Chamber, and the judgment of the Court below was reversed.

It was ingeniously contended by Mr. Wilson that this case differed from that of *Pomfret* v. *Ricroft* (2), inasmuch as the plaintiff had in this case entered into an express covenant with the defendants to repair the house demised to him, and that he could not perform his covenant unless the defendants were under a duty to support his house.

We think, however, although it might be an answer to an action for non-repair by the defendants against the plaintiff that the repair had been rendered impossible by the neglect of some

(1) 2 E. & B. 845; 23 L. J. (Q.B.) 1. (2) 1 Saund. 322; Wms. Notes, 557.

18 Jur. 332.

precedent obligation on the part of the defendants, still that no such obligation can be implied, and that a special covenant alone could impose such a liability.

It was further contended that the circumstances of this case distinguished it in principle for the reasons assigned by Twysden, J., in *Pomfret* v. *Ricroft* (1), namely, that in the present case the defective wall having become a party wall by the effect of the demise to the occupier of No. 38, the plaintiff was prevented from interfering to repair the party wall himself, and, therefore, had no remedy.

It may be open to doubt whether the support of the plaintiff's house and the party wall was, strictly speaking, in the nature of an easement or not, but assuming that the right of support in this case is in the nature of an easement, founded on implied grant, it is well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and that he may enter on the land of the owner of the servient tenement for that purpose: *Pomfret* v. *Ricroft*. (1) We think that the demise to Smith, and the fact that the wall may have become a party wall under that demise, does not affect the question. The defendants had a right to repair the party wall as between themselves and Smith, or if it was in a ruinous state, to take it down and rebuild it without being trespassers: *Cubitt* v. *Porter* (2), *Stedman* v. *Smith* (3); and we think that the plaintiff might exercise whatever right of repair the defendants had in order to preserve his easement.

It was admitted by the defendants' counsel that they could in no respect do anything to withdraw or affect the support rendered by the party wall to the plaintiff's house; but he contended that no other or further obligation could be implied against them, and this being our opinion, the defendants are entitled to judgment.

Judgment for the defendants.

Solicitors for plaintiff: *Nelson, Son, & Hastings.*
Solicitor for defendants: *Philbrick.*

(1) 1 Saund. 322; Wms. Notes, 557. (2) 8 B. & C. 257.
(3) 8 E. & B. 1; 26 L. J. (Ex.) 314.

1876
March 6.

THIIS AND OTHERS *v.* BYERS.

Ship and Shipping—Charterparty—Liability of Charterer for Delay in unloading caused by bad Weather.

By a charterparty for a voyage with a cargo of timber from Pensacola to a safe port in the United Kingdom "sixteen working days were to be allowed the merchants for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days at 10*l.* per day."

The ship was ordered to M., and arrived at the usual place of discharge in the river and began unloading. It was the duty of the master to put the timber over the ship's side, and form it into rafts, and the charterer was to send tugs and take the rafts away. During the unloading bad weather came on, and, though the ship did not leave her anchorage, the rafts could not be formed, and the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days demurrage:—

Held, that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days; and the defendant, therefore, was liable for the four days demurrage.

FIRST COUNT, for not unloading and discharging the cargo of a ship of the plaintiffs within the fourteen lying days allowed by the plaintiffs to the defendant for so doing by agreement between them.

Second count, for demurrage.

Pleas, inter alia, to the first count: 1. That the defendant did not agree as alleged. 3. That the plaintiffs were not ready and willing to permit the defendant to unload the ship. 4. That defendant was prevented from unloading solely by the acts and defaults of the plaintiffs and their servants. 5. To the rest of declaration never indebted.

Issue joined.

At the trial before Grove, J., at the Michaelmas sittings in London, it appeared that the defendant chartered the plaintiffs' vessel on the 31st of January, 1874, for a voyage from Pensacola to any safe port in the United Kingdom, as ordered, with a cargo of pitch pine timber.

1876

THIS v. BYERS.

In the charterparty was the following clause:—"Sixteen working days are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days, at 10*l.* per day."

The vessel was ordered to Middlesborough, and arrived at the usual place of discharge in the river Tees, and began discharging. It was the master's duty, by the practice of the port, to put the timber over the ship's side and form it into rafts, and the consignees then sent steam tugs to carry it away. After the discharging had begun rough weather came on, during which the master, though ready, was unable to put the timber over the side and form it into rafts, and consequently it was not possible for the charterers to take any timber away, though the ship remained at her anchorage and the tugs could have towed the timber away if it could have been formed into rafts. The unloading was thus delayed owing to the rough weather four days.

On the other part of the case, on which no point of law arose, a verdict was found for the plaintiffs for 41*l.* 14*s.* 6*d.*, and a verdict was taken for 81*l.* 14*s.* 6*d.*, and judgment directed for that amount, with leave to defendant to move to reduce the amount by 40*l.*, being four days demurrage at 10*l.*, if the Court should be of opinion that, on the true construction of the charterparty, the defendant was not responsible for the delay occasioned by the bad weather.

Notice of motion was given pursuant to the leave reserved, on the ground that the defendant was not responsible for the ship's detention during the days in which the ship was not ready to unload, raft, and deliver the cargo; and on the ground that those only of the lying days were to be reckoned as against the charterer during which the ship was so ready to unload, raft, and deliver cargo.

Feb. 16. *C. Russell, Q.C.* (with him *Edward Pollock*), in support of the motion. The defendant is not liable for the delay in unloading the ship where the unloading, as here, is the common employment of the ship and freighter. It was the duty of the

1876

THIIS v. BYERS.

ship to discharge the timber over the side and form it into rafts, and then of the defendants, the charterers, to send tugs and take it away.

[BLACKBURN, J. Neither party was to blame for not working during the stormy weather.]

The default was in the ship; for if the rafts had been formed the tugs could have towed them away. The unloading being the common employment of both parties neither is liable for delay caused by vis major: *Ford* v. *Cotesworth.* (1)

[BLACKBURN J. There were no lay days for unloading stipulated for there. The days are named on purpose to prevent these kinds of disputes.

LUSH, J. When a certain number of days for unloading are allowed, does not that mean that the charterer undertakes to unload in that time or pay demurrage?]

No doubt that was what was held in *Randall* v. *Lynch* (2) and *Leer* v. *Yates.* (3) In the first case, Lord Ellenborough ruled that the freighter was liable for demurrage when the unloading was delayed by the crowded state of the dock. And, in the other, the Court of Common Pleas went so far as to hold that the freighter was liable where the delay in getting the defendant's goods out was caused by the goods of other consignees being above them. But in Abbott on Shipping, 11th ed. p. 275, it is said that the decisions in those cases, and the cases which followed upon them, have been much doubted; and the cases of *Rogers* v. *Hunter* (4) and *Dobson* v. *Droop* (5) are cited, in which Lord Tenterden expressly dissented from the doctrine that there was an absolute contract by the freighter to unload within the stipulated time where the unloading was prevented by the goods of other consignees.

Herschell, Q.C., and *Sutton*, shewed cause. When a certain number of days are given for unloading, the lay days begin from the time the ship is ready to discharge, and the charterer is responsible if he detain the vessel beyond the given number of days, however the delay may be occasioned, unless by the act of the shipowner.

(1) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544.
(2) 2 Camp. 352, 356.
(3) 3 Taunt. 387.
(4) Mood. & M. 63, 65.
(5) Mood. & M. 441, 443; 4 C. & P. 112.

1876

THIS v. BYERS.

[BLACKBURN, J. By the mode of discharge at the port of Middlesborough it was the shipowner's duty to deliver the timber over the side and make it into rafts.]

No doubt; but it was not the master's fault that he could not deliver; it was owing to the tempestuous weather, in other words, neither party was in fault, and the consequences of the delay must fall on the charterer. In *Brown* v. *Johnson* (1) delay was occasioned, after the ship was placed in dock, by reason of her being unable to get to a berth from the crowded state of the dock; and it was held that the lay days ran from the entry into dock. There, just as here, neither party were in fault, but the loss was held to fall on the charterer. The principle of that case was expressly adopted in *Tapscott* v. *Balfour* (2) and *Ashcroft* v. *Crow Orchard Colliery Co.* (3). "Weather permitting," might have been added as an exception; but the charterer is bound to load and unload in the given days or pay demurrage, unless prevented by anything coming expressly within the exception. In *Fenwick* v. *Schmalz* (4), "riots, strikes, or any other accidents beyond the charterer's control," were excepted, and a snowstorm was held not to come within the exception; and that case is therefore an authority that the charterer is answerable for delay in unloading owing to bad weather. This was, in fact, taken as clear law as long ago as *Randall* v. *Lynch.* (5) Lord Ellenborough there said: "The question is, whether the detention of the ship, arising from the inability of the London Dock Company to discharge her is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London Docks it was impossible for the plaintiff (the owner) to make use of her, and to all intents and purposes she was detained by the defendant. When she was brought into the docks all had been done which depended upon the plaintiff, and the dock company were the defendant's agents for the delivery. The

(1) 10 M. & W. 331.
(2) Law Rep. 8 C. P. 46.
(3) Law Rep. 9 Q. B. 540.
(4) Law Rep. 3 C. P. 313.
(5) 2 Camp. at pp. 355–356.

1876

THIS v. BYERS.

defendant is as much responsible for a delay arising from want of a berth, as if it had arisen from *tempestuous weather* or any other cause." It is a fallacy to say that because it is the duty of the shipowner in this particular case to assist in the delivery, that therefore the charterer is not responsible if delay occurs owing to no default of the shipowner; although it was the duty of the master and crew to deliver the timber and form it into rafts, yet, as they were ready and waiting, the delay was not theirs. Suppose the cargo had been a perishable cargo, which was to be delivered over the ship's side into lighters, if wet weather prevented this being done the consequences of the delay must fall on the charterers. *Barker* v. *Hodgson* (1) and *Barret* v. *Dutton* (2) were decided on the same principle as *Randall* v. *Lynch*. (3) In *Barret* v. *Dutton* (2), Gibbs, C.J., held that where a certain number of running days were allowed for loading, the freighter is liable for delay caused by the impossibility of loading owing to ice in the river. The present case is not distinguishable in principle by the simple fact that it is the acts of the master and crew in making the delivery that are directly prevented, and not the acts of the defendant in accepting it.

C. Russell, Q.C., in reply.

Cur. adv. vult.

March 6. The judgment of the Court (Blackburn and Lush, JJ.) was delivered by

LUSH, J. (4) This is an action for demurrage. The verdict was entered for the plaintiff for 81*l.* 14*s.* 6*d.*, leave being reserved to the defendant to reduce the amount by 40*l.*, being for four days detention, at the stipulated rate of 10*l.* per day; and the question is, whether, when a charterparty allows a given number of days for discharging the cargo, the charterer or the shipowner takes the risks of casualties in the weather which interrupt the process of unloading.

The charterparty was for a voyage from Pensacola to a safe port in the United Kingdom, as ordered, with a cargo of timber.

(1) 3 M. & S. 267.
(2) 4 Camp. 333.
(3) 2 Camp. 352, 356.
(4) The judgment was read by Archibald, J.

1876

THIS v. BYERS.

The clause upon which the question turns is in these words: "Sixteen working days to be allowed the said merchants (if the ship is not sooner dispatched) for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days, at 10*l.* per day."

The ship, having been ordered to Middlesborough, arrived at the usual place of discharge in the river, and commenced the unloading. It was the duty of the master to put the timber over the ship, and form it into rafts, and the charterer was to take the rafts away.

In the course of the unloading, bad weather came on, and, though the ship did not leave her anchorage, the rafts could not be formed, and the charterer consequently could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship; and the contention of the defendant was, that, as he was not in default, but was ready to receive the timber, but the master was not ready to deliver it, the time lost in consequence of the bad weather ought not to be reckoned as part of the fourteen days.

We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days. This is the doctrine laid down by Lord Ellenborough in *Randall* v. *Lynch* (1), which was upheld by this Court; and it has been accepted as the guiding principle ever since: see *Leer* v. *Yates* (2), *Harper* v. *M'Carthy* (3), *Brown* v. *Johnson* (4), and the other cases cited in the argument.

The obvious convenience of such a rule, in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this con-

(1) 2 Camp. 352, 355.
(2) 3 Taunt. 387.
(3) 2 B. & P. (N. R.) 258, 267.
(4) 10 M. & W. 331.

1876

THIS v. BYERS.

struction should be adhered to, whatever may be the form of words used in the particular charterparty.

The judgment of the Court will, therefore, be for the plaintiffs for the full amount.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*
Solicitor for defendant: *Cree.*

Jan. 13.

DAVIES *v.* GARLAND.

Practice—Writ of Summons, Renewal of—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 11—38 *&* 39 *Vict. c.* 77, *Sch., Order VIII., Rule* 1.

Where an original writ of summons, issued in January, 1875, and renewed in July, has been lost, the Court has no power to allow a renewal of it, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11, by ordering a verified copy to be sealed.

THE writ of summons in this cause was issued on the 16th of January, 1875, and was duly renewed on the 14th of July. Since the renewal, the original writ had been lost.

An application for a further renewal having been made at Chambers, Lindley, J., referred the matter to the Court.

Jan. 13. *Francis* accordingly applied to the Court to order the proper officer to seal a verified copy of the writ as if it were the original renewed writ. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11, enacts: "No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month, or year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior Courts, and to be impressed upon the writ by the proper officer of the Court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a præcipe in such form as has hitherto

been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

[BLACKBURN, J. How can we say that the copy with the seal impressed shall be the original?

LUSH, J. It would be a very dangerous precedent.

COCKBURN, C.J. We have no power to renew a writ at all except under s. 11, and that section requires a particular formality which cannot be complied with.

BLACKBURN, J. Suppose we were to grant the application, and the defendant were to plead the Statute of Limitations, he must succeed, for what we should have done would be a mere nullity. There are two very strong cases very much against the application: *Nazer* v. *Wade* (1), where the attorney paid the proper fee in due time, but omitted to get the writ sealed, and did not discover the omission until the time had expired; and the Court held they had no power to direct the officer to impress the seal; and *Evans* v. *Jones* (2), where the office was shut on the last day for renewing the writ, and the Court refused to order the writ to be sealed nunc pro tunc.]

Fisher v. *Cox* (3) is another case to the same effect; but in all those cases the six months had lapsed; the present application is during the currency of the renewed writ.

COCKBURN, C.J. It is clear we have no power to grant this application.

BLACKBURN and LUSH, JJ., concurred.

Application refused. (4)

Solicitor for plaintiff: *R. H. Pearpoint.*

(1) 1 B. & S. 728; 31 L. J. (Q.B.) 5.
(2) 2 B. & S. 45; 31 L. J. (Q.B.) 61.
(3) 16 L. T. (N.S.) 397.
(4) Order VIII. Rule 1, Sch. to the Judicature Act, 1875 (38 & 39 Vict. c. 77) is in similar terms to s. 11 of 15 & 16 Vict. c. 76, except that the original writ is in force for twelve months, and the renewal requires the leave of the judge or registrar.

(1) 1 B & S. 728; 31 L J. (Q.B.) 5.
(2) 2 B. & S. 45; 31 L. J. (Q.B.) 61.

1876
Jan. 17.

[IN THE COURT OF APPEAL.]

WRIGHT *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Negligence—Master and Servant—Licensee—Railway Company, Duty of, towards Customer assisting Railway Servants in delivering his Goods.

The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse-box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so:—

Held, affirming the decision of the Queen's Bench, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; 6 Ex. 123).

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants. (1)

At the trial before Pollock, B., at the Cumberland summer assizes, 1874, it appeared that the plaintiff, on the 27th of March, 1873, sent a heifer by the defendants' railway to their Penrith station. On the arrival of the train at the station between 8 and 9 p.m., the horse-box into which the heifer had been put had to be shunted from the line to a siding in order to get the heifer out. The station is a small one, and there were only one or two porters available to shunt the horse-box, and the plaintiff, who had travelled by the same train, being desirous of getting his heifer without delay, assisted in shunting the horse-box to the siding, from which alone the heifer could be delivered to him; while he was doing so the horse-box was run into by a train which had been negligently allowed by the defendants' servants to come out of the siding; and the horse-box was driven against the plaintiff and seriously injured him. There was evidence that it

(1) Law Rep. 10 Q. B. 298.

was the practice at the Penrith station for persons having cattle, &c., carried by the defendants' railway to assist in shunting the trucks; and there was evidence that on this particular occasion the station-master was aware that the plaintiff was taking part in the shunting, and had assented to his doing so.

The defendants called no evidence.

The learned judge was of opinion that the case was not governed by *Degg* v. *Midland Ry. Co.* (1), and directed a verdict for the plaintiff, the only question left to the jury, by consent, being the amount of damages, which they assessed at 1629*l.*; leave being reserved to move to enter a nonsuit or a verdict for the defendants.

A rule was obtained accordingly, on the ground that the plaintiff was assisting the servants of the defendants, and was in the same position as the servants; and that there was no evidence of the negligence of any persons for whose negligence the defendants were, under the circumstances, liable.

This rule the Court of Queen's Bench discharged on the 3rd of May, 1875. (2)

Aspinall, Q.C., and *Gully*, in support of the motion. The case is governed by *Degg* v. *Midland Ry. Co.* (1), which decides that a person who assists the defendants' servants cannot be in a better position than the servants, and must take his chance of any negligence of the servants, just as if he were a fellow servant.

[LORD COLERIDGE, C.J. The Court of Queen's Bench held that the case was within the principle of *Holmes* v. *North Eastern Ry. Co.* (3), which was a case in the Exchequer Chamber.]

Degg v. *Midland Ry. Co.* (1) was affirmed in the Exchequer Chamber by *Potter* v. *Faulkner.* (4) *Holmes* v. *North Eastern Ry. Co.* (3) was not the case of negligence of fellow servants; the defendants' premises were in an insecure condition, and it was held that the defendants having invited or, at least, allowed the plaintiff, for a lawful purpose, to go upon them, they were answerable for the injury he sustained owing to the insecure state of the pre-

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171. Sym Dig. 395

(2) Law Rep. 10 Q. B. 298.

(3) Law Rep. 4 Ex. 254; 6 Ex. 123.

(4) 1 B. & S. 800; 31 L. J. (Q.B.) 30. Sym Dig. 259

1876

WRIGHT v. LONDON AND NORTH WESTERN RAILWAY CO.

mises. That is a very different case from the present, where the injury arises not from the state of the premises, but from the negligence of servants. The evidence as to the practice at the station is immaterial, as it was not shewn that the plaintiff knew of it. Then, assuming that there was assent on the part of the station-master to the plaintiff's assisting in the shunting, and assuming that the station-master represents the defendants, still the plaintiff is not the less a volunteer; or, rather, all that the defendants can be taken to have assented to is, that the plaintiff should be allowed to assist the defendants' servants in order to expedite the delivery of his heifer, and if so, he was merely in the same position as one of the servants.

Herschell, Q.C., and *Crompton*, for the plaintiff, were not heard.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. The facts of the case are substantially correctly stated in the report in Law Rep. 10 Q. B. 298. It is immaterial whether there was only one or two porters. The plaintiff assisted in the shunting of the horse-box in which his heifer was, and that this was done with the assent of the station-master is proved by evidence which satisfied the Court of Queen's Bench and which satisfies us: for had it not been so he would no doubt have been called as a witness, and it is to be observed that the defendants called no evidence. It was also proved that it was the common practice for persons to assist in shunting the cattle trucks, but this is immaterial, as the station-master must be taken to have assented to the plaintiff doing so on the present occasion. While the plaintiff was thus assisting in the shunting, he was injured through the admitted negligence of the defendants' servants. The Court of Queen's Bench held that the facts were distinctly within the principle of *Holmes* v. *North Eastern Ry. Co.* (1), and not within that of *Degg* v. *Midland Ry. Co.* (2) The principle of the two cases is very simple and plain, and free from all difficulty, and we have to see whether the facts of the present case come under one or other of the two principles. The facts in *Holmes* v. *North Eastern Ry. Co.* (1) were

(1) Law Rep. 4 Ex. 254; 6 Ex. 123.
(2) 1 H. & N. 773; 26 L. J. (Ex.) 171.

extremely like the present; the plaintiff was a person entitled to the delivery of a waggon of coals, and the usual mode of delivery at the tip or drop was impossible, by reason of the crowded state of the station, and he was allowed by the company's station-master to go to another place where the waggon was to get the coals, and he fell through into a hole, owing to the negligent keeping of the defendant's premises; and it was held that the plaintiff was engaged with the consent of the defendants in a transaction of common interest to both parties, which prevented him from being there as a volunteer, and entitled him to have the defendants' premises kept in a reasonably secure condition. Channell, B., says: "In one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word *mere* has a very qualifying operation. We must infer from the silence of the station-master that he acquiesced in the plaintiff's going on to the siding, for the purpose of getting coal from his waggon in the way in which he did get it." So here we must take it that the station-master acquiesced, and so authorized the way in which the plaintiff assisted in getting delivery of his heifer, which the defendants were bound to deliver to him. I may observe that the case of *Holmes* v. *North Eastern Ry. Co.* (1) is one of the greatest authority, because in the Exchequer Chamber seven judges affirmed the decision for the reasons given by the judges in the Court of Exchequer. It is plain, therefore, that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all risks upon himself which he met with in the employment; nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow servant. But the defendants being bound by contract to deliver the heifer to the plaintiff, they, by their representative the station-master, allowed the plaintiff to take part in the delivery, and they were therefore bound to see that he did not get injured by the negligence of their servants.

JAMES, L.J. I think it would be a shocking state of the law if a person in the position the plaintiff was could not recover. I am glad to find that the case of *Holmes* v. *North Eastern Ry. Co.* (1)

(1) Law Rep. 4 Ex. 254; 6 Ex. 123.

1876

WRIGHT v. LONDON AND NORTH WESTERN RAILWAY CO.

has established a principle within which this case falls, which is in accordance with common sense.

MELLISH, L.J. It is settled by *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner* (2) that if a man's servant invites a friend as a mere volunteer, for his own amusement, as it were, to take part in a dangerous duty, and he meets with injury in the course of it, the master is not liable. The present case differs in several essentials. First, the plaintiff was not a mere volunteer, but was assisting to get his own heifer. I do not say that in every case a person wanting to get his goods off the railway could justify his being on the premises assisting the railway servants; but there may be cases in which it would be but reasonable that he should interfere and assist them where a mere stranger could not. Here there was a difficulty in getting the horse-box shunted; and the practice at the station was to allow persons to assist in getting their cattle trucks shunted; and in the present case the station-master was standing by and made no objection to the plaintiff's assisting. It is obvious that if a company allow persons to take this part in doing what they ought to do, in order to save porters, they must take upon themselves the consequences if the persons are injured by the negligence of the company's servants. We had a case in this Court a few weeks ago from the Common Pleas Division, on appeal from a county court, very similar to the present, in which the station-master of a railway company allowed a cart and horse of the plaintiff's to go to a siding, the station yard being crowded, and the horse met with an injury owing to falling down an unfenced embankment; and the county court judge held the defendants liable; and we refused, as the Common Pleas had done, to interfere. (3)

BAGGALLAY, J.A., concurred.

CLEASBY, B. As I was one of the judges who took part in the decision of *Holmes* v. *North Eastern Ry. Co.* (4), I wish to add a

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171. 3 Jur. N.S. 395

(2) 1 B. & S. 800; 31 L. J. (Q.B.) 30. 8 Jur. N.S. 259

(3) See *Sharrock* v. *London and North Western Ry. Co.*, 1 C. P. D. 70, 76.

(4) Law Rep. 4 Ex. 254.

few words as to the attempted distinction between that case and the present. *Holmes* v. *North Eastern Ry. Co.* (1) was a case rather near the line; and the question was whether there was such a relation between the plaintiff and the company as to entitle the plaintiff to redress for negligence, the plaintiff having, to a certain extent, had an option of doing or not doing what he did. It seems to have established that where a man is on the premises of a railway company for the purpose of carrying into effect a contract of carriage and delivery, and gets the assent of the company (as indicated by the usual course of business) to assist in the delivery, the plaintiff is entitled to redress if the part of the premises where he is engaged is in a condition which is dangerous to the persons engaged upon it, and injury ensues to him.

We have therefore this, established by that case, that such a person is not to be regarded as a volunteer.

In the present case, it follows that if the injury had arisen from the condition of the premises being dangerous, the plaintiff could have recovered. But this distinction is now taken, that the negligence here is that of the servants of the defendants; and it is said that, as the plaintiff was assisting the defendants' servants he becomes a fellow servant. But this distinction makes no difference, for this reason: persons who engage in work with fellow servants are said to take the chances of the sort of negligence which they themselves or their fellow servants may be guilty of; and it is well established now that a servant cannot recover from his master damages in respect of the negligence of a fellow servant: *Bartonshill Coal Co.* v. *Reid.* (2) Is the plaintiff here in the position of a fellow servant? The plaintiff was in that position in *Degg* v. *Midland Railway Company* (3) and in *Potter* v. *Faulkner.* (4) But he is not so here. He has not agreed to be the fellow-servant of the defendants' servants. But, according to a usual practice, he has assisted in the delivery of his own goods, on his own behalf, not as a servant of the company. On the evidence, the plaintiff assisted either according to the usage or as a volunteer; and I cannot say

(1) Law Rep. 4 Ex. 254.
(2) 3 Macq. 266.
(3) 1 H. & N. 773; 26 L. J. (Ex.) 171.
(4) 1 B. & S. 800; 31 L. J. (Q.B.) 30.

1876

WRIGHT v. LONDON AND NORTH WESTERN RAILWAY CO.

that the only effect of the evidence is that the defendants assented to his being in the position of a fellow servant.

Appeal dismissed.

Solicitors for plaintiff: *Johnston & Harrison,* for *Harrison & Little, Penrith.*

Attorney for defendants: *R. F. Roberts.*

Jan. 18.

[IN THE COURT OF APPEAL.]

HOWELL *v.* COUPLAND.

Contract of Sale, Construction of—Sale of specific Crop—Sale of "200 Tons of Potatoes grown on Seller's Land in W."—Condition—On failure of Crop Seller excused Performance.

1 C.P.D. 466

Defendant, in March, agreed to sell to plaintiff "200 tons of regent potatoes grown on land belonging to defendant in W., at 3*l.* 10*s.* per ton, to be delivered in September and October, and paid for as taken away." In March defendant had sixty-eight acres ready for potatoes, which were afterwards sown, and were amply sufficient to have grown more than 200 tons in an ordinary season; but in August, without any default in defendant, the disease attacked the crop, and defendant was able to deliver only about eighty tons:—

Held, affirming the decision of the Queen's Bench, that the contract was for potatoes off specific land, and was therefore a contract for a part of a specific crop, although not sown at the time; and was within the principle of *Taylor* v. *Caldwell* (3 B. & S. at p. 833). The contract was therefore subject to the implied condition that the parties shall be excused if before breach performance becomes impossible from the perishing of the thing without default of the contractor.

APPEAL by the plaintiff from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the defendant. (1)

The plaintiff is a potato merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode, in the same county.

In 1872, the defendant, at the proper season, and in the due course of husbandry, appropriated between eighty and ninety acres of land for the growth of potatoes: sixty-eight acres at Whaplode, and about twenty in Holbeach.

In March of the same year the plaintiff and the defendant en-

(1) Law Rep. 9 Q. B. 462.

tered into the following contract:—"A memorandum of agreement, made this day of 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of regent potatoes grown on land belonging to the said Robert Coupland in Whaplode, at and after the rate of 3*l.* 10*s.* 6*d.* per ton, to be riddled on $1\frac{5}{8}$-in. riddle, and delivered at Holbeach railway station, good and marketable ware, during the months of September or October, as the said John Howell may direct, and, under his direction, the purchaser to find riddles. It is further agreed between the said Robert Coupland and the said John Howell, that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract, out of the sixty-eight acres in Whaplode, twenty-five were actually sown with potatoes, and the remaining forty-three acres were ready for sowing. The forty-three acres were afterwards sown in due course, and the whole sixty-eight acres together were amply sufficient, in an ordinary season and in the ordinary course of cultivation, to produce a much larger quantity than 200 tons, the land producing, on an average, seven tons to the acre.

In July and August, without any default on the part of defendant, a disease which no skill or care on the part of the defendant could have prevented attacked the crop and caused it to fail; and when the time for taking it up arrived, the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach together, amounted to no more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease.

If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which in fact he had not, it would have been too late to sow it.

The present action was brought to recover damages for the non-delivery of the residue of the 200 tons, and the verdict at the trial was entered for 432*l.* 5*s.*, leave being reserved to move to enter the verdict for the defendant, on the ground that he was not liable to deliver the ungrown potatoes.

1876

HOWELL v. COUPLAND.

A rule having been obtained accordingly, it was made absolute by the Court of Queen's Bench on the 22nd of May, 1874. (1)

D. Seymour, *Q.C.*, and *Waddy*, *Q.C.*, in support of the motion. This was not a contract to supply a particular article, and is not within the cases of *Taylor* v. *Caldwell* (2) and *Appleby* v. *Myers* (3), which were acted upon in the Court below. Here the contract could not be a contract for specific potatoes, for none were in existence at the time of the contract. It was an absolute contract to supply 200 tons of regent potatoes at the proper season, with the additional warranty, not only that they should be regent potatoes, but grown on land of the defendant in Whaplode, which was famous, as it appears, for growing good potatoes. That being so, and this duty to supply not being a duty cast upon the defendant by law, but created by his own contract, "he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract": *Walton* v. *Waterhouse* (4), recognised by Willes, J., in *Clifford* v. *Watts* (5), and by Blackburn, J., delivering the judgment of the Court, in *Taylor* v. *Caldwell* (6), where he says: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in Roll. Abr. p. 450, Condition (G), and in the notes to *Walton* v. *Waterhouse* (4), and is recognised as the general rule by all the judges in the much-discussed case of *Hall* v. *Wright*." (7) So, again, in *Jones* v. *St. John's College* (8), Hannen, J., says: "Undoubtedly, it may be an unusual or an unwise contract to enter into, but there is no reason why a man should not enter into such a contract. Certainly, if he does in direct terms enter into a contract to perform an impossibility, subject

(1) Law Rep. 9 Q. B. 462.

(2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(3) Law Rep. 2 C. P. 651.

(4) 2 Wms. Saund. 421 *a*, n. (6th ed.).

(5) Law Rep. 5 C. P. at p. 586.

(6) 3 B. & S. at p. 833; 32 L. J. (Q.B.) at p. 166.

(7) E. B. & E. 746; 27 L. J. (Q.B.) 345.

(8) Law Rep. 6 Q. B. 115, 127.

to a penalty, he will not be excused because it is an impossibility."

[CLEASBY, B., referred to *Robinson* v. *Davison*. (1)]

All the judges in that case put their decision on the ground that the contract there, from its nature, being for personal services, was based on the condition that the person would be in a position to perform them; and they said it was not an absolute contract. But here it is an absolute contract to deliver a stated quantity of potatoes of a particular quality and off particular ground; but not specific potatoes.

Herschell, Q.C., and *Beasley*, contrà, were not heard.

LORD COLERIDGE, C.J. I am of opinion that the judgment ought to be affirmed. [The Lord Chief Justice read the contract and facts.] The Court of Queen's Bench held that, under these circumstances, the principle of *Taylor* v. *Caldwell* (2) and *Appleby* v. *Myers* (3) applied, and the defendant was excused from the performance of his contract. The true ground, as it seems to me, on which the contract should be interpreted, and which is the ground on which, I believe, the Court of Queen's Bench proceeded, is that by the simple and obvious construction of the agreement both parties understood and agreed, that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance. They had been in existence, and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance. It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused. I am, therefore, of opinion that the judgment of the Queen's Bench should be affirmed.

(1) Law Rep. 6 Ex. 269. (2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(3) Law Rep. 2 C. P. 651.

1876

HOWELL v. COUPLAND.

JAMES, L.J. I think the case was rightly considered in the Court below to turn upon the construction of the contract. Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied; or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion it is the latter; and if so, the principle of the cases relied on applies, and the defendant is excused by reason of his being prevented by causes for which he is not answerable.

MELLISH, L.J. I am of the same opinion. The words of the contract are clear: the defendant "agrees to sell 200 tons of regent potatoes grown on land belonging to him in Whaplode." That is, potatoes which shall be grown in Whaplode. They are to be grown there, and delivered to the plaintiff provided they are grown there. Is not that a condition; so that, according to the cases on which the Court of Queen's Bench acted, if the thing perishes before the time for performance, the vendor is excused from performance by the delivery of the thing contracted for? No doubt there is a distinction in the present case, that the potatoes, the things contracted for, were not in existence at the time the contract was entered into. But can that make any real difference in principle? Suppose the potatoes had been full grown at the time of the contract, and afterwards the disease had come and destroyed them, according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied.

BAGGALLAY, J.A. I at first doubted whether the contract excluded the possibility of the defendant being able to perform his contract by delivering potatoes grown on other land; but on

consideration, it is clear the contract is confined to particular land; and the statement in the case is that sixty-eight acres, the amount actually sown with potatoes, was a due proportion to enable the defendant to perform his contract in an ordinary season.

CLEASBY, B. I am of the same opinion. I put my decision, not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has become impossible by vis major. Here there was not an absolute contract to deliver 200 tons of potatoes in September and October, but 200 tons of potatoes grown on particular land. Not 200 tons of potatoes simply, but 200 tons off particular land. The crop on this particular land has failed, and there is nothing to which the promise can apply. If the crop had existed at the time of the contract, and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract.

Appeal dismissed.

Solicitors for plaintiff: *Monkton, Long, & Co.*, for *Ayliff, Holbeach.*

Solicitors for defendant: *Wright, Bonner, & Wright*, for *Bonner & Calthrop, Spalding.*

1876
Jan. 21.

BATT *v.* PRICE.

County Court, Fees in—Fees for Return to Certiorari—19 & 20 *Vict. c.* 108, ss. 78, 79—*Action by Registrar for Recovery of Fees.*

By 19 & 20 Vict. c. 108, s. 78, the fees payable on the proceedings in the county courts shall be those mentioned in sch. (C); and such fees shall be paid in the first instance by the party on whose behalf any such proceeding is to be taken, before such proceeding is taken; and in default of payment of any fees, payment shall, by order of the judge, be enforced by such means as may be employed to recover any debt adjudged by the Court to be paid. By s. 79, the commissioners of the Treasury, from time to time, with the consent of the Lord Chancellor, may alter the fees in sch. (C), and may order new fees to be paid on any proceedings which are now or shall hereafter be authorized to be taken in such courts, whether any fee is now payable thereon or not.

An order of the Treasury, with the consent of the Lord Chancellor, was made in December, 1867, regulating the fees, amongst which was, "For making a return to a writ of certiorari, 1*l.* 5*s.*"

The defendant, a solicitor, being defendant in a plaint in a county court, obtained a writ of certiorari to remove the plaint into the Court of Queen's Bench. He lodged the writ with the registrar of the county court; nothing was said about the payment of any fee; and the return was duly made.

The registrar having sued the defendant in the county court to recover the fee, it was proved, in addition to the above, that it was the practice of the registrar not to insist on the prepayment of fees by solicitors on whom he could rely for payment.

The judge having given judgment for the plaintiff; on appeal:—

Held, that the return to the writ of certiorari was a proceeding taken in the county court within s. 79, and the fee was therefore within the authority of the commissioners of the Treasury; and by the tacit understanding between the plaintiff and defendant a promise to pay the fee was to be inferred, and therefore an action would lie.

By Lush, J., that an action would lie for the fee at common law, without reference to any tacit understanding between plaintiff and defendant.

Appeal from the county court of Monmouthshire, holden at Abergavenny.

The action was to recover 1*l.* 5*s.*, the fee for making a return to writ of certiorari in the plaint of *James Reed* v. *James Gilbert Price*, in the Abergavenny Court.

On the 23rd of January, 1872, a plaint was entered in the Abergavenny county court by James Reed, against the defendant, to recover a sum of 50*l.* which had been received by the defendant as the deposit-money on the contract for sale of a small estate.

The defendant's liability in that action involved questions of moment, and the defendant made an application to the Court of Queen's Bench for a writ of certiorari for removal of the action into that Court, and a writ was granted.

On the 5th of March, 1872, this writ was delivered by Mr. Roberts, a clerk of the defendant, to Mr. Scanlon, a clerk of the plaintiff, in the registrar's office of the county court at Abergavenny.

Upon that occasion nothing passed between Mr. Roberts and Mr. Scanlon relative to a fee being due from the defendant to the plaintiff on the writ being so delivered; nor was anything said about it between or on behalf of the parties until a short time afterwards, when Mr. Scanlon demanded of Mr. Roberts the payment of a fee of 1*l.* 5*s.* for making a return to the writ of certiorari, and which demand Mr. Roberts communicated to the defendant, who was of opinion that the fee was not legally payable, and refused to pay it.

When the writ of certiorari was delivered by Mr. Roberts at the county court office on the part of the defendant, no representation was made that the fee would not be paid, or that its payment would be disputed. It is a fee mentioned in the table of fees required to be hung up in the court house and in the registrar's office, under 19 & 20 Vict. c. 108, s. 78.

It was stated in evidence also that it was not unusual to delay demanding fees payable by solicitors; that is, the immediate payment of them is not always required. This was not contested.

The writ was signed by the judge, and the usual return was made. The registrar charged himself with the amount of the fee, and included it in his account with the treasurer.

By 19 & 20 Vict. c. 108, s. 78, "The fees payable on the proceedings in the county courts mentioned in schedule (C) to this Act shall be those therein specified; and such fees shall, except in interpleaders, or where such fees shall be payable in respect of keeping possession, appraising, or selling goods seized, be paid in the first instance by the party on whose behalf any such proceeding is to be taken, before such proceeding is taken; and in default of the payment of any fees, payment thereof shall, by order of the judge, be enforced by such means as might be employed to recover any

1876

BATT v. PRICE.

debt adjudged by the Court to be paid; and a table of fees shall be posted in some conspicuous place in every court house and in ever registrar's office."

By s. 79 "the commissioners of Her Majesty's Treasury, from time to time, with the consent of the Lord Chancellor, may lessen or increase the fees which are specified in schedule (C) to this Act, or which are now payable on proceedings in the county courts taken under any Act not hereinbefore recited, and may substitute other fees in lieu thereof, and may order new fees to be paid on any proceedings which are now or shall hereafter be authorized to be taken in such courts, whether any fee is now payable thereon or not:"

By an order dated the 30th of December, 1867, the Commissioners of the Treasury, with the consent of Lord Chancellor Chelmsford, ordered that on and after the 1st of January, 1868, the several fees specified in the schedule thereunder written should be taken on the proceedings therein mentioned; and in one of those schedules (A) is comprised a fee:—

"For making a return to a writ of certiorari, of which 15*s.* shall be returned by the treasurer to the registrar, for his costs out of pocket, 1*l.* 5*s.*" (1)

The defendant contended, first, That the judge of the county court was bound to obey the Queen's writ, and that his obedience to it was not a proceeding in the county court, and that the order of the Treasury seeking to levy a fee upon such act of obedience is ultra vires and void.

2ndly. That if such fee were payable no action to recover it is maintainable, but that the plaintiff should proceed under 19 & 20 Vict. c. 108, s. 78.

3rdly. That if an action on contract could be brought to recover such fee there was no evidence of any contract.

The judge was of opinion that the plaintiff was entitled to recover, and gave judgment for the plaintiff.

Bosanquet, for the defendant. The making a return to a writ of certiorari is not a proceeding in the county court, consequently

(1) See Davis' County Courts, 5th ed. pp. 16, 19.

the Treasury had no power to impose this fee under 19 & 20 Vict. c. 108, s. 79, and it was therefore illegal and cannot be recovered in any way. It is the duty of the registrar of the county court to make the return, and he would be liable for contempt if he did not make it. Secondly, assuming the fee to be legal, the only remedy is by applying to the judge as directed by s. 78.

[LUSH, J. Debt lies at common law for fees and against the attorney in the case. Here the defendant was both party and solicitor. Nor is this remedy taken away merely because a special summary remedy is given. The power to issue execution under 1 & 2 Vict. c. 110, did not take away the remedy by attachment.]

Jelf, for the plaintiff, was not heard.

BLACKBURN, J. There is no real doubt in this case. The legislature, as part of the revenue, have required that certain fees shall be taken on proceedings in the county courts, and handed over to the Treasury. By 19 & 20 Vict. c. 108, s. 78, the fees payable on the proceedings in the county courts are to be those specified in the schedule; and such fees shall (with certain exceptions), be paid in the first instance by the party on whose behalf such proceeding is to be taken, before such proceeding is taken; and in default of the payment of any fees, payment thereof shall, by order of the judge, be enforced by such means as might be employed to recover any debt adjudged by the Court to be paid. Then there is the important enactment in s. 79, that the Treasury, from time to time, with the consent of the Lord Chancellor, may not only alter the fees in the schedule, but "may order new fees to be paid on any proceedings which are now or shall hereafter be authorized to be taken in such courts, whether any fee is now payable thereon or not." The Treasury have accordingly directed, amongst others, that a fee of 1*l.* 5*s.* be taken "for making a return to a writ of certiorari." Now, first, it is said that making a return to a writ of certiorari is not a proceeding taken in the county court, and that the Treasury therefore have no power to order the fee to be taken. But it seems to me that it most clearly is a proceeding in the county court. It has a direct effect

1876

BATT v. PRICE.

on the cause, and on the receipt of the writ it becomes the duty of the officer of the county court, as such officer, to make a return; although the effect is to remove the cause from the county court to a superior court, still it is a proceeding in the county court. It is an act done, a step taken in the cause: why is it not a proceeding? Then the fee in the first instance is to be paid by the party on whose behalf the proceeding is taken. On whose behalf was this proceeding taken? By the defendant, who obtained the writ, and by serving it compelled the necessity of a return being made. The defendant, therefore, is the person who ought to have paid the fee. But then it is said he cannot be sued for the fee; the remedy was by going before the judge of the county court and getting him to issue process in order to enforce the payment of the fee as directed by s. 78. That may be the ordinary course, but does it prevent the remedy by action of debt at common law being maintainable for the fee? We need not, however, consider that, because here it is quite clear that by the tacit understanding between the parties the registrar does not require from respectable solicitors the fees to be prepaid, but gives them credit, and consequently there is an implied promise on their part to pay the fees. It was argued that there is no fee payable on lodging the writ, and the registrar would be bound to make the return whether the fee were paid or not; but the fees are to be prepaid, and I doubt whether the nonpayment of the fee would not be an answer on the registrar's part, if the party were to attempt to proceed against the registrar for his contempt in not making the return, and most likely the writ of certiorari would be quashed; but it is unnecessary to consider the position of the registrar in such a case. Here the defendant on lodging the writ tacitly asked for credit, and obtained it on his tacit promise to pay, in accordance with the usual practice between the registrar and solicitors who are known at the office.

MELLOR, J. I am of the same opinion. The points attempted to be argued are really not open.

LUSH, J. The term "proceedings" is used in a very wide sense in s. 78. For it says the fees payable on the proceedings in the

1876

BATT v. PRICE.

county courts shall be those specified in schedule (C), and among them is "For taking the acknowledgment of a married woman, 1*l*." Now the acknowledgment is not taken in the county court, nor before the county court judge sitting as judge; and making a return to a writ of certiorari, by which a plaint is removed from the county court to a superior court, is at least quite as much a proceeding in the county court. Therefore, I think the Lords of the Treasury were justified in including this fee for a return to a certiorari in their new table of fees. As to the liability of the defendant to be sued in an action, without resorting to the implied credit and agreement from the course of practice—as to which I by no means dissent from what my Brother Blackburn has said—I think the defendant would be liable at common law to an action of debt for the fee, which the section says shall be paid before the proceeding is taken. It is well-known law that an action of debt will lie at common law for fees. Is that remedy taken away by the fact that a special remedy is given? I think not.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. Scott Lawson, for Batt, Abergavenny.*

Solicitors for defendant: *Harston, Hunter, & Downs, for Price, Abergavenny.*

LISTER *v.* VAN HAANSBERGEN.

Feb. 11.

Shipping—Charterparty—Condition that Charterers' Liability shall cease when Cargo is shipped—"Loading excepted."

A charterparty contained a clause: "This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed that they shall have":—

Held, that "loading excepted" extended to delay in loading, and was not confined to the loading a full and complete cargo; and the charterers, therefore, remained liable for the delay, though they had shipped a complete cargo.

DECLARATION on a charterparty for unduly detaining the ship in loading.

Plea, setting out the charterparty: "Newcastle-upon-Tyne,

1876

LISTER v. VAN HAANSBERGEN.

14th June, 1875. It is this day agreed between Mr. John Lister, owner of the British or privileged good ship or vessel called the *Antias*, of Hartlepool, of the burthen of 13½ keels or thereabouts, now in the River Tyne, and Messrs. Van Haansbergen and Usher, of Newcastle-upon-Tyne, as agents to the freighters of the said ship, Messrs. A. Vander, Leems, Son & Co., for one voyage from the River Tyne to Rotterdam. That the said vessel being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed as directed by the said freighters, and there load from the factor of the said freighters a full and complete cargo, consisting of four to five keels firebricks, and load up with Ramsay's Garesfield Coke, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed with the first opportunity and all possible dispatch to Rotterdam, and there deliver the same alongside any vessel, wharf, or warehouse, as ordered, where she can safely deliver, on being paid freights at and after the rate of 6*l.* 5*s.* sterling per keel of eleven tons for the coke, and 7*l.* 10*s.* sterling per keel of twenty-one tons for the bricks for the quantity taken on board as aforesaid, and two guineas gratuity, the freighter paying all dues and duties on the cargo, and the ship all other charges. As soon as the cargo is shipped, the master to sign bills of lading, as presented, without prejudice to this charter. This charter being concluded by the said Messrs. Van Haansbergen and Usher for and on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed they shall have, and that the vessel is to be reported and cleared at the Custom House at Newcastle by the said Messrs. Van Haansbergen & Usher, and all money for charges or otherwise due by the owners or master shall be paid on the captain receiving despatches (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). The freight to be paid on unloading and right delivery of the cargo in cash for ship's use, and

the remainder by an approved bill on London at two month's date, or all in cash equal thereto at master's option. Seven working days are to be allowed the said merchants for unloading (if the ship is not sooner despatched), and demurrage to be paid over and above the said lying days at two pounds per day. Penalty for non-performance of this agreement, amount of freight. The vessel to be addressed to the charterers' agent at port of discharge, paying the usual brokerage only.

"By authority of owner, ppro. James Thompson, J. Knott.

"As agents, Van Haansbergen and Usher."

That the person mentioned in the charterparty as Mr. John Lister is the plaintiff; and the defendant is mentioned as Messrs. Van Haansbergen and Usher; and the defendant was, at the time of the making of the charterparty, agent for Messrs. Vander, Leems, & Co., and that the defendant loaded the said agreed cargo on board the said ship.

Demurrer and joinder.

W. Williams, Q.C. (with him *J. R. Wright*), in support of the demurrer. The question is, what is the meaning of the exception in the clause in the charterparty by which it is agreed that defendant's liability shall cease as soon as the cargo is shipped, "loading excepted." This must extend to delay in loading; indeed, it would have no meaning if it were confined to loading a full cargo, for it is not until the cargo is shipped that defendant's liability is to cease at all. The exception was manifestly inserted in order to obviate the decisions which had taken place as to the meaning of similar clauses in charterparties. In *Milvain* v. *Perez* (1) the clause expressly said that, on the loading of the cargo, all liability of the charterer should cease, as well before as during and after the loading, and there could, therefore, be no doubt as to the meaning. But in later cases the phrase was only "all liability of the charterer shall cease;" and in *Bannister* v. *Breslauer* (2), *Francesco* v. *Massey* (3), and *Kish* v. *Cory* (4), in the Exchequer Chamber, it was held that this included all liability past as well as future. The

(1) 3 E. & E. 495; 30 L. J. (Q.B.) 90. Jm 25.337

(2) Law Rep. 2 C. P. 497.

(3) Law Rep. 8 Ex. 101.

(4) Law Rep. 10 Q. B. 553.

1876

LISTER v. VAN HAANSBERGEN.

present exception was inserted to limit the cesser of liability to the future, and to leave all liability for delay in loading untouched; and this is very reasonable, for the charterer in this country, although only agent, is the proper person to see that there is no default as to the loading.

Herschell, Q.C., for the defendant. "Loading excepted" applies only to loading a full cargo. As soon as the cargo is shipped, that is, not a full cargo, but a cargo according to the terms of the charterparty, so as to give a lien, then the defendant's liability as to all but that as to which there is no lien, viz. the loading a full cargo, is to cease.

[BLACKBURN, J. Is there any lien given for unliquidated damages for not loading in proper time? There is no demurrage given by the charterparty as to loading.]

A lien is given for "demurrage and all other claims," and demurrage is wide enough to include damages for detention, which is in the nature of demurrage; at all events demurrage is ejusdem generis with damages for detention, and these damages would then be included in "all other claims."

W. Williams, Q.C., was not heard in reply.

BLACKBURN, J. We must construe this clause in the charterparty according to what seems to have been the intention of the parties from the words they have used; and the words seem to admit of only one meaning. The charterer usually undertakes that the ship shall be loaded with a full cargo with reasonable dispatch, if no specified time is named. Those who framed this charterparty undertook that the charterer should do that, viz. load with a full cargo with reasonable dispatch. The ship is, with all convenient speed, to proceed as directed by the freighters, and there load a full and complete cargo, consisting, &c., and then proceed with it to Rotterdam, and the freighters thereby impliedly undertake to supply a full and complete cargo with like dispatch. Then there is the clause in question, that "the charter being concluded by the defendants as agents for another party, it is agreed that all liability of the defendants shall cease as soon as the cargo is shipped,"—clearly implying that they were to be liable up to the loading,—then comes the exception "loading excepted, the owners and

master agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, which lien it is hereby agreed they shall have." Mr. Herschell maintained that the expression "all other claims" would give a lien for every claim liquidated or unliquidated, and so for damages for detention. I doubt this; but assuming it would, still "loading excepted" must be an exception of all liability as to loading which the freighters had taken upon them, viz. to load a full cargo within a reasonable time; the exception as to loading must be co-extensive with the liability, and it excepts all liability connected with loading. Mr. Herschell ingeniously argued, that if the lien upon the cargo is given for delay in loading, then the liability for that delay is excepted out of the exception, and that the only thing excepted is the liability for not loading a full cargo; we cannot yield to this ingenious argument. We must give a plain meaning to the plain words used: "We, the charterers, are to remain liable for all connected with the loading." Judgment must, therefore, be given for the plaintiff.

LUSH, J. I am of the same opinion. The words are general, and the exception must extend to any liability which the charterers have taken upon them connected with the loading.

QUAIN, J. I am of the same opinion. As to loading, the charterers intended that they should undertake and retain all liability as to that; in other words, they were to be principals as to that, but only agents as to the rest.

Judgment for the plaintiff.

Solicitors for plaintiff: *Gold & Son.*

Solicitors for defendant: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle.*

1876
Jan. 18.

SIMPSON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Damages for Breach of Contract—Notice of Special Purpose—Non-delivery of Samples—Loss of Profits.

1 PD. 463
4 QBD. 672

The plaintiff, a manufacturer, who was in the habit of attending at agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show-ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show-ground at another place, when and where a similar show, at which he intended to exhibit, was to be held; but nothing was expressly said about this intention of the plaintiff. The samples did not arrive till after the day stipulated and when the show was over, and the plaintiff lost several days in going to meet them, and waiting for them. In an action for the breach of contract, a verdict was given for damages which included a sum for loss of time or loss of profit:—

Held, the Court drawing the inference of fact that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract, that the plaintiff was entitled to the damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of his prospect of making profit at the particular show in question.

Declaration, first count, that the plaintiff delivered to the defendants, and the defendants received from him certain goods, to wit, cattle-spice, cattle-meal, and calf-meal, to be carried from Bedford to Newcastle-upon-Tyne, and there delivered in time for a cattle-show to be there held on the 22nd, 23rd, and 24th of July, 1874, yet the defendants did not deliver the goods in time for the said cattle-show, whereby the plaintiff lost the use of the goods and the profits which he would have made by exhibiting and selling them at the cattle-show, and his travelling expenses and time in going to Newcastle to meet the goods.

Another count alleged that the goods were to be delivered within a reasonable time; breach, that they were not so delivered; damages as in the first count.

Plea: payment into court of 10*l*. Replication, damages ultra. Issue joined.

At the trial, before Cockburn, C.J., at the Kingston spring assizes, 1875, it appeared that the plaintiff was a manufacturer of cattle-spice, cattle-meal, and calf-meal, carrying on business in London. He was in the habit of sending samples of these goods,

with a show-tent and banners, to the chief cattle-shows held in various parts of the country, and attending there himself to exhibit them in order to attract custom. In July, 1874, a cattle-show was held at Bedford, and samples of the plaintiff's goods were exhibited there in the usual way. The defendants had an agent and office on the show-ground for the purpose of delivering and receiving goods, and preventing traffic from being diverted to competing lines. On the 18th of July, the Bedford show being about to end, and a similar show at Newcastle being about to be held on the 22nd, 23rd, and 24th of July, where the plaintiff desired to exhibit his goods, the plaintiff, by his son, who was in charge of the show-tent and samples, made with the defendants' agent a contract for the carriage of the samples. The evidence as to the terms of the contract was, that a consignment-note was filled up by the plaintiff's son, consigning the goods as "boxes of sundries," to "Simpson & Co., the show-ground, Newcastle-on-Tyne," and that he indorsed the note "must be at Newcastle on Monday certain," meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, or as to the goods being samples. The goods did not arrive till several days after time, and when the show was over.

The sum paid into court sufficed only to cover pecuniary expenses of the plaintiff, as to which the defendants' liability was not disputed. The plaintiff lost several days in going to and waiting at Newcastle to meet the goods. It was proved that he obtained custom by exhibiting his samples at shows, but no evidence was given as to his prospects with regard to the Newcastle show in particular.

By consent a verdict was entered for the plaintiff for 20*l.* beyond the sum paid into court, with leave to move to enter the verdict for the defendants, if the Court should be of opinion that the plaintiff was not entitled to recover for either loss of profit or loss of time; if held entitled to recover for the one or the other, the verdict to stand. The Court to draw inferences of fact.

A rule nisi was obtained accordingly.

Thesiger, Q.C., and *Lumley Smith,* shewed cause. It must be

1876

SIMPSON v. LONDON AND NORTH WESTERN RAILWAY CO.

taken that the defendants' agent had notice, or at least full knowledge, that the plaintiff's object was to exhibit goods at the Newcastle show, and the plaintiff is clearly entitled, on the principle of all the cases, to compensation for all the natural consequences of failure of that object; knowledge without notice is sufficient. In *Cory* v. *Thames Ironworks Co.* (1), Blackburn, J., sums up the effect of *Hadley* v. *Baxendale* (2) as being that damages are to be for the natural consequences of a breach of contract made under circumstances which both parties were aware of. In *Great Western Ry. Co.* v. *Redmayne* (3) the principle is recognized, although the damages claimed were not allowed. In *Horne* v. *Midland Ry. Co.* (4) the cases are reviewed, and although the exceptional profits claimed were disallowed, the principle on which the plaintiff relies was admitted. The damage on either of the alternative grounds, loss of time or loss of profits, is a proximate result of the failure of the goods to arrive in time for the show: *Wilson* v. *Newport Dock Co.* (5), where Martin, B., considers the rule as to what is the proximate result of the breach of contract. The claim is clearly sustainable on the ground of loss of time, but it is sustainable also on the ground of loss of profits. It is no objection to the claim as a claim for loss of profits, that no evidence was given that the plaintiff would have made profit at the Newcastle show. In *O'Hanlan* v. *Great Western Ry. Co.* (6), where objection was made to a claim of loss of profits, that there was no evidence that any profits could have been made at the place of destination, the answer was held good, that the plaintiff must be presumed not to have sent his goods to a place where he could obtain no profit.

[FIELD, J. referred to *Watson* v. *Ambergate Ry. Co.* (7)]

Gates, Q.C., and *C. H. Anderson*, in support of the rule. The argument for the plaintiff goes farther than any decided case. The defendants ought to have been told that the goods were samples: *Woodger* v. *Great Western Ry. Co.* (8)

(1) Law Rep. 3 Q. B. at p. 186.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) Law Rep. 1 C. P. 329.
(4) Law Rep. 7 C. P. 583; Law Rep. 8 C. P. 131.
(5) Law Rep. 1 Ex. 177, at pp. 184, 186. 12 Jur. N.S. 233
(6) 7 B. & S. 484; 34 L. J. (Q.B.) 154. 11 Jur. N.S. 797.
(7) 15 Jurist, 448.
(8) Law Rep. 2 C. P. 318.

(2) 5 C. 18 Jur. 358.
(3) 5 C. 12 Jur. N.S. 692.

[FIELD, J. Must we not infer as a matter of fact that notice of their being samples was given?]

Great Western Ry. Co. v. *Redmayne* (1) shews that distinct notice must be given.

[COCKBURN, C.J. Knowledge of circumstances from which the purpose would naturally be inferred is sufficient without express notice of the purpose itself.]

As to the loss of profits, such profits as these have never been held recoverable.

[COCKBURN, C.J. Can it be disputed that these profits would have been recoverable, if an express stipulation had been made that the goods should be delivered by a particular day, and the defendants had been told what the result of non-delivery would be?]

That might be disputed.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The plaintiff in the present case is in the habit of going about the country exhibiting his cattle spice at shows, to attract purchasers. The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line; and their agent must have known that the plaintiff had been exhibiting these goods, and that they were being sent to Newcastle for the same purpose. I, therefore, cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.

(1) Law Rep. 1 C. P. 329.

1876

SIMPSON v. LONDON AND NORTH WESTERN RAILWAY CO.

MELLOR, J. I am of the same opinion. As a juryman I come to the conclusion that the clerk to the defendants had notice of the object for which the goods were being sent. As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves.

FIELD, J. I am of the same opinion. I apprehend that for a breach of contract a plaintiff is entitled to recover for damage naturally following under circumstances known to both the parties. In this case, inasmuch as railway companies do not often bind themselves to deliver by a particular day, the defendants' attention would be attracted by the stipulation which was made to that effect. Then, where was the contract made? Upon a show ground. To what place was it the goods were to be sent? To a similar show ground. The inference from which would naturally be that the goods were being sent for the purpose of being shewn there. Further, if the defendants' agent did not so understand the matter he might have been called to say so, but that was not done. Therefore I infer, as judge of fact, that both parties were aware of the circumstances with a view to which the plaintiff was contracting, and that they were made the basis of the contract. Then, as to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profit. I may add that I think a larger sum might have been awarded.

Rule discharged.

Solicitors for plaintiff: *Chorley & Crawford.*
Solicitor for defendants: *R. F. Roberts.*

JONES *v.* JONES.

1876
Jan. 18.

Devise—Condition in Restraint of Marriage—Distinction between Wills of Realty and Personalty.

D. made his will as follows:—"I give, devise, and bequeath unto my sister Mary, her daughter Elizabeth, and Sarah, the daughter of David Jones, all my landed property, together with all my goods, chattels, and effects, to possess and enjoy the same jointly during their lifetime; and when any or some of the before-mentioned parties shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime: Provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed by the other mentioned parties, share and share alike:"—

Held, that the estate of Mary Davies in the land ceased on her marriage; for that the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Davies while she was unmarried; and the question whether the clause amounted to a condition or a limitation was immaterial, as the authorities upon such a distinction did not apply to a devise of realty.

APPEAL from the county court of Cardigan, holden at Llampeter.

Replevin against the defendant for having distrained on the plaintiff's cattle for half a year's rent, due on the 29th of September, 1874, in respect of the messuage, farm, and lands called Blaenanucha.

The defendant contended he was justified in levying the distress, inasmuch as he had purchased the estate and interest of one Mary Davies in the said hereditaments, which estate and interest had arisen under the will of Simon Davies, dated the 13th of March, 1854:—"I, Simon Davies, of Blaenanucha, in the parish of Cellan, in the county of Cardigan, yeoman, do make my last will and testament in manner and form following:—I give, devise, and bequeath unto my sister Mary, her daughter Elizabeth, and Sarah, the daughter of David Jones, Erwberllwyn, in the parish of Cellan, in the county of Cardigan, tailor, all my landed property, called and known by the name of Blaenanucha, aforesaid, together with all my goods, chattels, and effect of my personal estate, to possess and enjoy the same jointly during their lifetime, and when any

1876

JONES v. JONES.

or some of the before-mentioned parties named, Mary my sister, Elizabeth her daughter, or Sarah the daughter of the said David Jones, shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, of Llan, in the parish of Cellan, together with her daughter Mary, during their lifetime: Provided the said Mary, daughter of the said Jemima my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other-mentioned parties, share and share alike."

The plaintiff admitted that until the marriage of the said Mary Davies, daughter of the testator's sister Jemima, with Roderick Evans, which took place on the 26th day of March, 1874, the defendant was entitled to her estate and interest, but contended that upon the happening of that event, she, according to the terms of the will, ceased to have any interest therein.

The judge of the county court, after having considered the case, gave judgment in favour of the defendant, holding that the estate and interest of Mary Davies, now Mary Evans, did not cease on her marriage, and that therefore the defendant (the rent being in arrear) had a right to distrain.

The plaintiff gave notice of appeal, the grounds of his appeal being that the estate and interest of Mary Davies, now Mary Evans, ceased on her marriage.

T. A. Roberts, for the plaintiff. The decision of the county court judge was wrong. The devise to Mary Davies ought to be construed so as to carry out the intention of the testator, and so construed it is a limitation to her until she marries, and not a condition in restraint of marriage. A gift until marriage is perfectly valid: *Webb* v. *Grace* (1), *Heath* v. *Lewis*. (2) There is no ground for holding the direction in this will to amount to a condition. A condition can only be reserved to the donor or feoffor and not to a stranger. It is a conditional limitation: *Harvey* v. *Aston* (3),

(1) 2 Ph. 701.

(2) 3 D. M. & G. 954; 22 L. J. (Ch.) 721.

(3) 1 Atk. 361.

17 Jur 443.

Williams v. *Fry* (1); Jarman on Wills, 3rd ed. vol. ii. p. 45; Bac. Abridg. Condition (H.). [He was then stopped.]

E. Ford (*Sir H. S. Giffard, S.G.*, with him), for the defendant. The county court judge was right. This is a condition in restraint of marriage, and not a mere limitation: *Webb* v. *Grace* (2) was not the case of a will, but a contract by deed.

[BLACKBURN, J. Without saying whether this is a condition or a limitation, is there any case where the validity of a devise of land turned upon whether the disposition amounted to a limitation or not?]

There is no authority exactly in point; but the question appears to have been raised in the case of a fund arising from realty and personalty: *Lloyd* v. *Lloyd.* (3) And in the recent case of *Bellairs* v. *Bellairs* (4) the Master of the Rolls seems to have entertained the opinion that a condition in restraint of marriage would be void if annexed to the income arising from a mixed fund. The general law is laid down by Wigram, V.C., in *Morley* v. *Rennoldson* (5), who says: "In the English law a distinction has been taken between the cases in which the restraint operates as a condition precedent and those in which it is expressed to take effect as a condition subsequent. A distinction has also been made as to whether it is a particular restraint (a partial and reasonable restraint), or whether it is a general restraint; and the decision is generally made to depend on the question whether there is a gift over or no gift over."

[BLACKBURN, J. The real question seems to be whether the testator intended to discourage marriage or not.]

The question in gifts of personalty has always been understood to be whether the restraint amounts to a limitation or a condition, and *Bellairs* v. *Bellairs* (4) and *Genery* v. *Fitzgerald* (6) shew the tendency in courts of equity to interpret a mixed devise according to the law as to personalty. [He also cited *Perrin* v. *Lyon* (7), Williams on Executors, 6th ed. vol. ii. 1185.]

(1) 1 Vent. 199.
(2) 2 Ph. 701.
(3) 2 Sim. (N.S.) 255.
(4) Law Rep. 18 Eq. 510.
(5) 2 Hare, 570, 579.
(6) Jac. 468.
(7) 9 East, 170.

1876

JONES v. JONES.

BLACKBURN, J. We need not trouble the counsel for the plaintiff to reply. The question arose in the county court under a replevin, the defendant having levied a distress upon land after having purchased the interest of one Mary Davies in it, and it was contended that by the will under which Mary Davies took this interest the estate ceased on her marriage. The county court judge thought that the estate of Mary Davies did not cease on her marriage. I have come to the conclusion that the estate did cease. A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions were established, as to whether the bequest amounted to a condition or only to a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions, and to see how far they apply, and whether we are bound to follow them, leaving the legislature to interfere for the amendment of the law. But this is a devise of land, which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land.

There is, I admit, strong authority, that when the object of the will is to restrain marriage and to promote celibacy, the Courts will hold such a condition to be contrary to public policy and void. But here there appears to be no intention to promote celibacy. The testator leaves all his real estate, together with all his goods and chattels, to three women, his relations, during their lifetime; and he then proceeds: "And when any or some of the beforementioned parties named, Mary my sister, Elizabeth her daughter, or Sarah, the daughter of the said David Jones, shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime: Provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she

is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties share and share alike." Now here, I think, when one sees the scope of the testator's dispositions, it comes to this: "I have left to three women enough to live upon, and if one of them dies I bring in Jemima and Mary. But if Mary" (I suppose as the youngest she was most likely to change her state) "happens to marry, her husband must maintain her, and her share shall pass to the rest." Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy. I think not. It is admitted that a limitation to Mary until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition, it is bad. If in the case of real estate there were a series of authorities shewing that the distinction between a condition and a limitation is material, we should be bound to follow them. But there are no such authorities; and I think that, looking at the object of this will, and the fact that the testator probably thought that his property was not more than enough for these women to live upon together, his direction that the one who married should lose her share, cannot be said to be opposed to public policy. I think, therefore, that the county court judge made a mistake, and his decision must be reversed.

16 Ch D 123

LUSH, J. I am of the same opinion. The question is, whether we are to construe this devise as a provision for the testator's niece while she remains single, or as a condition that she shall remain in a state of celibacy under the penalty of losing her share. Now there is nothing to lead me to suppose that any such condition was intended by the testator, and I rather think that to imply such a condition would be to defeat his intention. We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal, and, as I read the words, the testator only meant to provide for her while she was unmarried. The words are:—[The learned judge read the devise.] I think that there is nothing in these words which compels us to think it was the testator's object that his niece should never marry at all.

1876

JONES v. JONES.

He probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife.

Judgment for the plaintiff.

Ford, for the defendant, asked that the costs might be paid out of the estate, by analogy to the practice in equity.

BLACKBURN, J. We cannot entertain the application. We have never had any such practice in this Court. It seems to me calculated to encourage litigation.

Solicitors for plaintiff: *Helder & Roberts.*
Solicitor for defendant: *C. M. Roche.*

Jan. 19.

PULBROOK *v.* LAWES.

Agreement for Lease—Statute of Frauds—Work done upon Premises by intended Lessee—Common Counts.

The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, which he accordingly did, and also laid down gas pipes, &c. with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done, &c. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds:—

Held, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent.

Hodgson v. *Johnson* (E. B. & E. 685; 28 L. J. (Q.B.) 88) questioned.

DECLARATION that the plaintiff and the defendant agreed that the defendant should grant to the plaintiff, and that the plaintiff should accept of the defendant, a lease of a dwelling-house in Seven Sisters Road, for seven, fourteen, or twenty-one years, upon condition that the defendant should carry out certain suggestions of the plaintiff as to certain specified alterations and improvements

in and to the dwelling-house, the plaintiff to pay 75*l.* towards the alterations and improvements, at the yearly rent of 120*l.*, and that before the execution of the lease the defendant should execute the alterations and improvements, and all conditions were fulfilled, &c., to entitle the plaintiff to have the alterations and improvements executed by the defendant, yet the defendant has not executed the alterations and improvements, &c., whereby the plaintiff has been deprived of the said lease, and divers expenses incurred by the plaintiff in preparing to take possession of the house and in making certain alterations and improvements in anticipation of the said alterations and improvements being executed by the defendant, by his permission, became wholly lost and useless to him.

Common counts for work done and materials provided by the plaintiff for the defendant, for money paid, and money due upon accounts stated.

Pleas, as to first count, denial of the agreement and the breaches. As to the common counts, never indebted. Joinder of issue.

At the trial a verdict was taken for the plaintiff, subject to the award of an arbitrator, who stated the following case:—

1. The plaintiff is an attorney and solicitor, and the defendant is a cabinet maker. The plaintiff, in a letter dated the 20th of May, 1873, proposed to take a lease of one of the defendant's houses if he would carry out certain suggestions and alterations contained in the letter. A correspondence ensued between the parties, and it was ultimately agreed between them that certain alterations should be done, the plaintiff to pay a sum of 75*l.* towards them.

2. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that he should send in his own workmen to paint it, and he accordingly did so. Gas-pipes were laid down by the plaintiff, and certain alterations and improvements were made by him with the defendant's knowledge and consent, and with a view to the plaintiff's occupancy of the premises. In anticipation of the house being handed over to him in accordance with the terms proposed in the letter of the 20th of May, and subsequent letters, the plaintiff ordered certain gas fittings, cornices, and blinds to be made to fit the house, and paid

1876

PULBROOK v. LAWES.

certain sums of money for work done and materials provided at the defendant's request for decorating the drawing-room and making the agreed alterations.

3. From divers causes the alterations and suggestions proposed by the plaintiff and agreed to be done by the defendant were so long in being carried out by the defendant (and never were in fact fully carried out) that the plaintiff was compelled to decline to take the house, the fittings for gas, cornices, and blinds which he had had expressly made for the house he was obliged to sell at a loss, and the money he paid for work and labour done at the defendant's request was also lost to him.

4. It is alleged on the part of the defendant that certain letters to be found in the appendix to this case form no agreement so as to satisfy the requirements of the 4th section of the Statute of Frauds (1), and this question, at the request of the defendant, is submitted for the consideration of the Court.

5. In the event of the Court being of opinion that the point is sustainable, and goes to the whole declaration, then the arbitrator directed a verdict to be entered for the defendant generally.

6. In the event of the Court being of opinion that the objection goes to the first count only, then he directed a verdict to be entered for the defendant on the first count, and for the plaintiff on the money counts for 51*l.* 3*s.*

7. In the event of the Court being of opinion that the point raised must fail, then he directed that a verdict be entered for the plaintiff on the first count for 40*l.*, and on the money counts 51*l.* 3*s.*

Horace Brown (*W. G. Harrison* with him), for the plaintiff. First, the letters set out in the appendix are a sufficient memorandum in writing to satisfy the Statute of Frauds.

[THE COURT intimated that upon this point the plaintiff must fail.]

At any rate the plaintiff may recover, under the common counts, the expense incurred by him in improving the house. The agreement that he should send in his workmen was collateral to the lease, or if not, there was part performance: *Nunn* v. *Fabian*. (2)

(1) It is not necessary to set out these letters. (2) Law Rep. 1 Ch. 35.

1876

PULBROOK v. LAWES.

Baylis, Q.C. (*T. E. Baylis* with him), for the defendant. It being conceded that the original agreement relating to the house is one upon which no action can be brought, the plaintiff cannot recover under the common counts. To support these counts it would be essential to put in the agreement, or otherwise it could not be shewn how the extra work came to be done. The common count must be looked at as if it had set out the agreement at length.

[BLACKBURN, J. Surely the plaintiff can recover for the work actually done. Supposing the agreement to go off, he would be entitled to have anything which he had parted with returned to him. Here it cannot be returned.]

Hodgson v. *Johnson* (1) is in point. There it was held that a part of the agreement relating to chattels could not be severed from that relating to the land, though, on the plaintiff's side the consideration was executed.

[BLACKBURN, J. The decision seems to have been on the special count. I do not find any reference to the count for money paid.]

The original agreement was, "I will take the lease, if you will make the alterations."

[BLACKBURN, J. If, instead of doing the work, the plaintiff had advanced the 75*l.*, could he not have recovered?

LUSH, J. If the agreement went off through the defendant's fault, was there not a failure of consideration?]

If the consideration failed the plaintiff is still not entitled to recover without some admission of liability by the defendant, and there was nothing of the kind here: *Cocking* v. *Ward.* (2) [He also cited *Pattinson* v. *Luckley* (3), *Kelly* v. *Webster* (4), *Sanderson* v. *Graves* (5), *Angell* v. *Duke* (6), and contended that the case did not shew that the work done by the plaintiff's order was any improvement to the house.]

BLACKBURN, J. I think that when we get over the difficulty of understanding the question which has been submitted to us the law is tolerably clear. The plaintiff and the defendant wrote

(1) E. B. & E. 685; 28 L. J. (Q.B.) 88. 5 Jur. N.S. 290

(2) 1 C. B. 858; 15 L. J. (C.P.) 245.

(3) Law Rep. 10 Ex. 330.

(4) 12 C. B. 283; 21 L. J. (C.P.) 163.

(5) Law Rep. 10 Ex. 234.

(6) Law Rep. 10 Q. B. 174.

1876

PULBROOK v. LAWES.

certain letters, and had certain interviews as to a house of the defendant, and the result of these letters and interviews was that the plaintiff proposed to take a lease of the house if the defendant would carry out certain improvements and alterations. Some of these improvements and alterations were completed, and then I think the case finds as a fact, that it was agreed that a lease should be granted, that the rest of the alterations should be executed by the defendant, but that the plaintiff should pay 75*l.* towards them. The first question is, whether the letters between the plaintiff and defendant are a sufficient memorandum in writing to enable the plaintiff to maintain an action on the agreement to grant a lease. [The learned judge referred to the letters, and expressed his opinion that they were insufficient to constitute such a memorandum.] I think, therefore, that as regards that part of his claim the plaintiff is not entitled to recover.

But then comes another question. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, and he accordingly did so. It is said by Mr. Baylis that this painting was not one of the terms of the agreement, and that it was fanciful painting and of no benefit to the house. But the arbitrator, no doubt, took into consideration the question whether there was any benefit to the premises or not. He says, "The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that he should send in his own workmen to paint it, and he accordingly did so." He further says, "Gas-pipes were laid down by the plaintiff, and certain alterations and improvements were made by him with the defendant's knowledge and consent, and with a view to the plaintiff's occupation of the premises;" and, further, "In anticipation of the house being handed over to him, the plaintiff ordered certain gas-fittings, cornices, and blinds to be made to fit the house, and paid certain sums of money for work done and materials provided at the defendant's request for decorating the drawing-room, and making the agreed alterations." Then follows this statement: "From divers causes the alterations and suggestions proposed by the plaintiff and agreed to be done by the defendant were so long in being carried out by the defendant (and never were in fact fully

carried out) that the plaintiff was compelled to decline to take the house, the fittings for gas, cornices, and blinds, which he had had expressly made for the house, he was obliged to sell at a loss, and the money he paid for work and labour done at the defendant's request was also lost to him." This statement is not clearly expressed, but I think that it must be taken to mean that through the defendant's default the plaintiff was prevented from taking possession of the house.

Now, if the plaintiff had gone into possession, and paid 75*l.*, and had afterwards been turned out, either from the defendant's default or in any other manner, could not he have brought an action to recover back the 75*l.*? I think he could, for it was money the consideration for which had totally failed. Instead of this, it appears that in the present case the defendant had arranged to make the alterations himself, but that the plaintiff did part of them in his place. I think that so far as the plaintiff did the work instead of the defendant, it was equivalent as between the parties to payment. If the agreement had continued, the plaintiff could not have sued for the 75*l.*; but when the contract goes off, it is exactly the same thing as if the consideration had failed, and the plaintiff is entitled to recover the value of what the defendant has received under a quantum meruit. It is clear that he is entitled to recover something, and here the arbitrator has fixed the amount. The argument of Mr. Baylis is, that as the agreement is one concerning an interest in land, and is not in writing, it cannot be given in evidence. But an agreement which cannot be put in evidence, such as an unstamped document, may be looked at for a collateral purpose. It would be very unjust if the plaintiff were not paid for what he has done at the defendant's request simply because the Statute of Frauds prevents the agreement from being given in evidence, and, in spite of the Act, I think he may recover under a quantum meruit.

Several cases were cited on behalf of the defendant. One of these is *Cocking* v. *Ward*. (1) But that case was decided before the Common Law Procedure Acts came into operation, and when there was not the same power of amending the special count as there is now; the Court, however, held that the plaintiff might

(1) 1 C. B. 858; 15 L. J. (C.P.) 245.

1876

PULBROOK v. LAWES.

recover the money due to her under the count for accounts stated. Now there are many cases which establish that no account can be stated unless in respect of a debt. In *Cocking* v. *Ward* (1), there could not be a count for land sold and delivered, and they had to resort to a subsequent acknowledgment to support the count for accounts stated. But now-a-days, when a liability is proved, the plaintiff is not defeated through a mistake in his pleadings, and though this may lead to some looseness, I think it is much more calculated to promote justice. Under a quantum meruit the plaintiff may recover, and the defendant cannot retain the benefit without paying the price.

LUSH, J. I am of the same opinion. The facts of this case are that the defendant agreed to grant a lease of a house to the plaintiff for seven, fourteen, or twenty-one years, and it was at first part of the agreement that the plaintiff should pay 75*l.* towards certain alterations in the house. Afterwards, the defendant agreed that the plaintiff should send in his workmen to paint the drawing-room in a particular manner. Now, it seems to me quite clear that the agreement between the plaintiff and the defendant was never expressed in writing so as to satisfy the Statute of Frauds. The plaintiff cannot, therefore, bring an action on the agreement; but the question remains, can he, under the common counts, recover the amount which he has expended on the house according to the finding of the arbitrator. Now, it seems to me, that what the plaintiff did was very much as if he had paid the 75*l.* into the hands of the defendant after the making of the agreement, in which case he would clearly be entitled to recover back the money. I cannot see that the fact that he has expended the money upon the improvement of the house with the consent of the defendant can make any difference.

I quite feel that in deciding as we do, we are going counter to *Hodgson* v. *Johnson*. (2) There the defendant, tenant of a brick-yard, agreed verbally with the plaintiff that the plaintiff should go into possession, taking the plant and bricks at a valuation, and the defendant was to pay the rent due from him. It was held that the plaintiff, though he had gone into possession, and had his

(1) 1 C. B. 858; 15 L. J. (C.P.) 245. (2) E. B. & E. 685; 28 L. J. (Q.B.) 88.

5 Jur. N.S. 290

goods sold under a distress, could not recover under the agreement to pay the rent, as it was not in writing. But the only point taken before the Court was whether the agreement to take the bricks could be severed from the agreement as to the occupation. It is strange that the Court seems to have overlooked the fact that, quite independently of the agreement to transfer the lease, the circumstances of the case originated a claim for compensation. If the point were to arise again, I am inclined to think that the decision would not be followed. This being so, I think the plaintiff is entitled to recover back the money which he has paid, as on a failure of consideration.

1876

PULBROOK v. LAWES.

Judgment for the plaintiff.

Solicitor for plaintiff: *Plaintiff in person.*
Solicitors for defendant: *Tilley & Soames.*

[IN THE COURT OF APPEAL.]

1876

Jan. 17; *Feb.* 15.

TAYLOR *v.* BOWERS.

Delivery of Goods for fraudulent Purpose—Right of Owner to repudiate Purpose and recover the Goods.

The plaintiff, being in embarrassed circumstances, in pursuance of an agreement between him and A., made over all his stock-in-trade to A., and fictitious bills of exchange were given by A. in plaintiff's favour. Possession of the goods was given to A., together with an inventory, but no bill of sale was executed by plaintiff. The object of the transaction was to prevent plaintiff's creditors getting hold of the goods, and so being paid in full. Defendant was a creditor for 100*l.*, and was cognisant of what was concocted between plaintiff and A. After A. had removed the goods from plaintiff's premises, two meetings of plaintiff's creditors were held, but no compromise was effected with the creditors. Some months afterwards A. executed a bill of sale of the goods to defendant, for the alleged purpose of securing the debt due from plaintiff to defendant, but plaintiff was no party to the bill of sale, nor did he sanction or know of it. Plaintiff having demanded the goods from A. and defendant, brought an action against defendant for the detention:—

Held, by the Queen's Bench and Court of Appeal, that, the fraudulent purpose not having been carried out, plaintiff was not relying on the illegal transaction, but was entitled to repudiate it, and recover his goods from A., and defendant had no better title than A., as he knew how A. had become possessed of the goods.

DECLARATION for the detention of a portable steam-engine and other chattels, the property of the plaintiff.

1876

TAYLOR v. BOWERS.

Pleas, 1, traversing the detention, 2, traversing the plaintiff's property as alleged. Issue joined.

The cause was tried before Cockburn, C.J., at the Cheshire summer assizes, 1874, when a verdict was found for the plaintiff, with leave to move to enter a verdict for the defendant.

A rule was obtained accordingly, on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant.

The facts of the case, on which the judgment of the Court proceeded, as well as the arguments, are sufficiently stated in the judgment.

Q. B. D.

1875. May 7. *McIntyre, Q.C.*, and *Lockwood*, shewed cause. They cited *Farmer* v. *Russell* (1) and *Bowes* v. *Foster*. (2)

B. T. Williams, in support of the rule, cited *Simpson* v. *Bloss* (3) and *Taylor* v. *Chester*. (4)

Cur. adv. vult.

Judgment, Q. B. D.

1876. Jan. 17. The judgment of the Court (Cockburn, C.J., Mellor, and Quain, JJ.), was delivered by

COCKBURN, C.J. This was an action brought to recover the value of a portable steam-engine and threshing machine and other articles of the plaintiff alleged to have been detained by the defendant.

The action was tried at the Chester summer assizes for 1874, before me, when a verdict was found for the plaintiff, with leave to defendant to move to enter the verdict for him or a nonsuit.

The facts were these: The plaintiff was a machinist carrying on business at Ranton, near Stafford, and in the year 1868 was possessed of the articles now in question as part of his then stock-in-trade. In that year he went to America, leaving his wife and son in possession of his stock-in-trade, and they carried on the business in his absence. He returned from America in 1869, and then learned that his son had incurred debts in respect of which he feared that claims would be made as having been incurred on his account. On this he consulted a person named Alcock, his

(1) 1 B. & P. 296.
(2) 2 H. & N. 779; 27 L. J. (Ex.) 262.
(3) 7 Taunt. 246.
(4) Law Rep. 4 Q. B. 309.

nephew, as to the course he should take. Alcock advised that all the plaintiff's goods should be assigned to, and delivered over to him, and that fictitious bills or notes should be accepted or drawn by the plaintiff in Alcock's favour, as the pretended consideration for the assignment; to all which the plaintiff consented; and the assignment having accordingly been made (1), Alcock removed the goods to Stafford, and placed them there in the yard of an inn.

It was not very clear on the evidence what Alcock's scheme was, so far as he himself was concerned. He was not called as a witness on either side. So far as regards the plaintiff, there can be no doubt that the object in view, when the goods were made over to Alcock, was to prevent any persons, being creditors of the plaintiff, or claiming to be creditors for goods supplied to his son, from being paid in full; a dividend of one shilling in the pound being all that was ever offered them.

It appeared that the defendant, to whom the plaintiff was indebted in the sum of 100*l.*, was taken into consultation by Alcock and the plaintiff, and was a party to the scheme for defrauding the creditors. He admitted that he all along stipulated for full payment of his debt, and asserted that he had been always promised it. So far as relates to Alcock it is probable that, acting in collusion with the defendant, his intention was, after paying the debt to the defendant in full, to appropriate the remainder of the proceeds to himself.

After the goods had been removed to Stafford the affair was placed by Alcock in the hands of a Mr. Brough, an attorney, and two meetings of the plaintiff's creditors,—whether real or collusive appears very doubtful,—were convened, at which one Jones, a clerk of Brough, took the chair. At the first the only creditor who attended was a person named Weet, a creditor to the amount of 2*l.* only, and who was paid off. At the second no creditor whatsoever attended; so that any attempt to effect a compromise with the creditors, if seriously intended, entirely failed.

In this state of things, some months after the goods had been removed, Alcock executed a bill of sale of them to the defendant, as was alleged, for the purpose of securing the defendant's debt; but

(1) No actual assignment to Alcock was executed by the plaintiff; but he delivered possession of the goods to Alcock together with an inventory.

1876

TAYLOR v. BOWERS.

Judgment, Q. B. D.

the plaintiff was no party to this bill of sale, nor did it appear that he knew of or sanctioned it. After this, as the plaintiff alleged, seeing nothing being done, and that no creditors were paid or settled with, he demanded back his goods from Alcock and the defendant. They, however, refused to give them back, and the defendant, professing to act on his bill of sale, caused them to be put up to auction and sold. They were bought by one Locket, at much under their value, and there can be little doubt that the sale was fictitious, and that they were bought on account of the defendant, for immediately after the sale they were removed to the defendant's premises. Be this as it may, the important fact is that, prior to the sale, written notice was served by the plaintiff on the defendant not to sell, and the return of the goods was demanded by him.

The only question left to the jury, the other material facts of the case being clear, was whether the defendant knew of the fraudulent scheme, as between Alcock and the plaintiff, to defeat the creditors of the latter, at the time when he took the bill of sale of the goods from Alcock. The jury found that he did; and there has been no complaint of that finding.

In the result the facts therefore stands thus: The goods were made over to Alcock for the purpose of defrauding the plaintiff's creditors. But they were made over by Alcock to the defendant without the plaintiff's authority, and not in furtherance of the fraudulent purpose for which they had been assigned to him. And while the fraud on the plaintiff's creditors originally contemplated remained wholly unaccomplished, the plaintiff repudiated what had been done, and claimed to have his goods restored to him, which done, they would have been again available to his creditors.

It is plain on these facts, coupled with the finding of the jury, that the defendant had no title to the goods, nor any lien or charge upon them; nor was it argued before us that he had; but it was contended,—and this was the only point made on behalf of the defendant,—that as the goods were delivered over to Alcock for a fraudulent purpose, and the plaintiff could not explain his right to recover without disclosing his fraud, he could not be heard in a court of justice to allege his own fraud, and he was therefore disentitled to recover in this action; and, in short, that the maxim,

"In pari delicto potior est conditio defendentis," applied to this case.

The defendant's counsel cited and relied on *Simpson* v. *Bloss*. (1) That was the case of an illegal wager, in which the plaintiff and the defendant went shares. After the wager was won, and before it was paid by the loser, the plaintiff advanced to the defendant his share, and on the loser becoming insolvent and failing to pay, the plaintiff sought to recover it back from the defendant. It was held that, as both parties were concerned in an illegal transaction, the plaintiff was not entitled to recover. In that case it will be observed that the money sought to be recovered was paid after the wager was lost and the transaction complete, and for the purpose of carrying out the arrangement.

In the present case nothing has been done to carry out the fraudulent or illegal object beyond the delivery of the goods to Alcock and their removal to Stafford. We put aside the bill of sale to the defendant, as the plaintiff was not a party to it, nor did it form part of the original arrangement. The next fact is, that before anything was done, and before the sale by auction, the plaintiff repudiated the whole transaction, and demanded back his goods from Alcock and the defendant. Under these circumstances, we think that the plaintiff is entitled to recover back his property from the defendant. The action is not founded upon the illegal agreement, nor brought to enforce it, but, on the contrary, the plaintiff has repudiated the agreement, and his action is founded on that repudiation.

Now it seems to us well established that where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods.

In *Hastelow* v. *Jackson* (2) Littledale, J., says: "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." And in *Bone* v. *Eckless* (3), Bram-

(1) 7 Taunt. 246.
(2) 8 B. & C. 221, 226.
(3) 29 L. J. (Ex.) at p. 440; 5 H. & N. 925.

1876

TAYLOR v. BOWERS.

Judgment, Q. B. D.

well, B., referring to *Hastelow* v. *Jackson* (1), says: "Clearly an authority to pay over money for an illegal purpose may be revoked before the money is paid over. In *Hastelow* v. *Jackson* (1) that proposition of law was laid down, although there the plaintiff had to prove, as part of his case, that he had entered into an illegal contract; he did not, however, seek to recover upon it. . . . The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards."

The case of *Symes* v. *Hughes* (2), before the late Master of the Rolls, resembles the present case, and is one of the latest authorities on the subject. In that case the plaintiff, being in pecuniary difficulties, assigned certain leasehold property to a trustee for the purpose of defeating his creditors. The trustee, treating the property as her own, assigned to the defendant, he covenanting to provide the assignor with board and lodging during her life. The plaintiff afterwards became bankrupt, and having made an arrangement with his creditors, filed his bill, praying that the defendant might be ordered to reconvey the property. "Two objections," said the Master of the Rolls, "have been raised on behalf of the defendant. The first is, that the assignment was made for an illegal purpose, and it is said, such being the case, the Court will not interfere. I think the correct answer to this was given, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. It is clear in the present case that no harm has been done to any creditor, and, in fact, the suit is now being prosecuted for the purpose of enabling the creditors to recover something."

It is true that in that case the plaintiff had covenanted with the assignee in bankruptcy to prosecute the suit, and in the event of his being successful, to pay his creditors a composition of 2*s.* 6*d.* in the pound. But we think that that circumstance does not affect the principle on which his right to recover depends, namely, that

(1) 8 B. & C. 221, 226. (2) Law Rep. 9 Eq. 475, 479.

the illegal purpose not having been carried out, he is entitled to repudiate the transaction and to recover back his money or property.

For these reasons, we think the verdict in the present case should stand; and the rule will be discharged.

Rule discharged.

1876

TAYLOR v. BOWERS.

Judgment, Q. B. D.

On appeal by the defendant.

Feb. 14, 15. *B. T. Williams, Q.C.*, and *Bigham*, for the defendant. They cited *Simpson* v. *Bloss* (1), *Holman* v. *Johnson* (2), *Pickard* v. *Sears* (3), *Alner* v. *George* (4), *Fivaz* v. *Nicholls* (5), and commented upon *Symes* v. *Hughes* (6) and *Bowes* v. *Foster*. (7)

C. A.

McIntyre, Q.C. (*Mellor, Q.C.*, with him), for the plaintiff, in the course of the argument for the defendant referred to *Bowes* v. *Foster* (7) as directly in point for the plaintiff; but they were not further called upon.

JAMES, L.J. The only question we have to consider is, whether the rule as obtained ought to have been made absolute. We cannot go into anything which took place at the trial, according to my view, to see whether the rule ought to have been wider in its terms. The rule was confined to a very short and simple point of law, that is, whether the plaintiff is estopped from recovering by reason that he is obliged to give evidence or tell a story involving his own fraud. The question is a question of demerit on the part of the plaintiff on this point, and we have not to inquire upon this rule, and, according to my view, we have no right to inquire into any question of merit or comparative merit on the part of the defendant.

Judgments, C. A.

The verdict that was obtained, and the rule that was granted, proceeded on the notion that the defendant had no title other than what Alcock had, neither was there any case on the defendant's part unless the plaintiff was estopped, that is to say, unless, as has been very properly suggested in the argument of the

(1) 7 Taunt. 246.
(2) Cowp. 341, 343.
(3) 6 A. & E. 469.
(4) 1 Camp. 392.
(5) 2 C. B. 501; 15 L. J. (C.P.) 125.
(6) Law Rep. 9 Eq. 475.
(7) 2 H. & N. 779; 27 L. J. (Ex.) 262.

1876

TAYLOR v. BOWERS.

Judgments, C. A.

defendant's counsel, they were in a position to have called upon the learned judge to nonsuit the plaintiff the moment the plaintiff's case had been opened, on the ground that he, by disclosing the fraud and that he was a party to the fraud, is disentitled from recovering the goods. Now the rule is, that a man certainly cannot recover goods in respect of which he is obliged to state a fraud of his own as part of his title. But that is not, according to my view, the position of this plaintiff. All the plaintiff has got to say is: "These were my goods. I was possessed of these goods in 1868. I have never parted with them to anybody. They are my goods still. I never sold them, and I have never given them to anybody in such a way as to deprive myself of the right to possession of them." It is the defendant who has got really to shew the fraud. He says, I claim these goods under a bill of sale by Alcock to me, and Alcock claims them under an assignment from the plaintiff to him by means of an inventory given to him with possession. Thus it is the defendant who has got to make out his title to the goods from the transaction which is a fraud, and which it seems he was a party to, in fact the defendant has got to make out his title from the fraudulent possession that was given to Alcock; and there would be no title in the defendant independently of that. So that if it was merely a question for the first time to be determined upon principle, without authority, I should have no doubt in saying that the plaintiff was not obliged to rely upon the fraud for the purpose of recovering back the goods, the legal possession of which in effect had never been parted with by him. But, to mention no other cases, the case of *Bowes* v. *Foster* (1) seems to me entirely upon all fours with this case. In this case Bowers took from Alcock with the knowledge of Alcock's title, so he was in fact a party to the whole transaction from beginning to end. Therefore Bowers, if that question were open upon this rule, can be in no better position than Alcock.

It appears to me, therefore, that the judgment of the Queen's Bench Division was right, and should be affirmed.

MELLISH, L.J. I am of the same opinion. I think the only question open upon this rule is, assuming that the plaintiff had

(1) 2 H. & N. 779; 27 L. J. (Ex.) 262.

never really intended to part with his goods to Alcock or to Bowers, whether he was precluded from recovering the goods from Bowers on the ground that he could not do so without proving the illegal transaction to which he was a party. That seems to me the only point raised on this rule, and the judgment of the Queen's Bench Division shews very clearly that they understood the terms of the rule in that sense, and discussed the case upon the assumption that the plaintiff never assented to the property in the goods being passed by the bill of sale from Alcock to Bowers; and, as far as I can see from the whole of the evidence, I think that, if the question had been left to the jury, they would have found the fact to be as the Court of Queen's Bench assumed it to have been proved. But, however that may be, the only question we have to determine is the question of law,—is the plaintiff precluded from recovering by the existence of the fraud?

Now, with reference to this, it seems to me that the defendant Bowers is in precisely the same position as Alcock, because, unless the plaintiff assented to the assignment of the goods by Alcock to the defendant for the purpose of paying the debt due from the plaintiff to the defendant, the mere circumstance that the plaintiff did owe a debt to the defendant is wholly immaterial. On the assumption, therefore, that the plaintiff did not assent to the bill of sale, the defendant was only taking title to the goods from Alcock. If the defendant had not known the defect in Alcock's title, then, inasmuch as the plaintiff had held out Alcock to be the owner of the goods, if the defendant had been a bonâ fide purchaser for valuable consideration without notice of the defect in Alcock's title, in my opinion the defendant might have held the goods against the plaintiff. But if the defendant, as the jury expressly found, knew the defect in Alcock's title, and knew that in reality the plaintiff had never intended to part with his goods to Alcock, the defendant was in no better position than Alcock. The question, therefore, is, would the plaintiff be prevented from recovering from Alcock? In my opinion he clearly would not; because he would not, as the rule is laid down in *Simpson* v. *Bloss* (1), require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing

(1) 7 Taunt. 246, 249.

1876

TAYLOR v. BOWERS.

Judgments, C. A.

the illegal transaction. If the illegal purpose had been carried out, and the composition of 1s. in the pound had been made with the plaintiff's creditors, and they had assented to be discharged, and afterwards the goods had been assigned by Alcock to Bowers, then, in my opinion, the creditors, on discovering the fraud, might have set the assignment aside, either by bringing an action for their debt, notwithstanding the composition, on the ground that their assent to the composition had been obtained fraudulently, and having got judgment issuing execution against these goods, and seizing them under a fi. fa., or by making the plaintiff a bankrupt, and by the trustee then seizing the goods. That the creditors might have done; nevertheless, if the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it wholly came to an end. To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done. In the present action the facts come within the first alternative; and I am of opinion that the Queen's Bench Division has properly held, that the plaintiff does not require the aid of the illegal transaction, but is really bringing the action to set it aside.

BAGGALLAY, J.A. I am of the same opinion, for the reasons assigned by Lord Justice Mellish.

GROVE, J. I am of the same opinion. Having heard the Lord Chief Justice's notes read, I come to the same conclusion as the rest of the Court, that the expression in the rule, "the plaintiff could not by the allegation of his own fraud get back the goods

from the defendant," is confined to the fraud which the plaintiff was a party to in making the sham assignment and handing over the goods to Alcock; and cannot, as the defendant's counsel contended, and as at one time I was inclined to think, extend to the fraud of which the plaintiff would have been guilty, had he assented to or connived at the goods being assigned to the defendant, who was a bonâ fide creditor of the plaintiff; in which case it certainly would have taken a good deal of argument to convince me that the plaintiff could recover the goods. But, to say the least, the question was left open upon the evidence, whether or not the plaintiff did assent to the assignment to the defendant; the question was not asked of the jury, which, I think, is to be regretted; but it appears either to have been assumed at the trial as a fact, or, at all events, as proved, that the plaintiff did not know of the assignment to the defendant. The rule must, therefore, I think, be construed as it has been construed by the rest of the Court; and the fraud must be confined to the sham assignment to Alcock. If that be the case, then the plaintiff is not setting up his own fraud in order to make a title, but he is repudiating the fraud and setting up his own prior rightful claim as owner of the goods. No doubt he is admitting that the goods got into Alcock's hands through his, the plaintiff's, own sham transfer for the fraudulent purpose of deceiving the creditors, but he is not setting up that fraudulent purpose in order to get the goods, but, on the contrary, he is setting it aside. I am, therefore, of opinion that the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Milne, Riddle, & Mellor.*
Solicitors for defendant: *Chester, Urquhart, & Co.*

1876
Jan. 11;
Feb. 15.

[IN THE COURT OF APPEAL.]

MORRITT *v.* THE NORTH EASTERN RAILWAY COMPANY.

Carrier by Railway—Negligence—Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 1—*Goods taken beyond Point of Destination.*

A carrier is not deprived of the protection afforded by the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, by the fact that the loss of or injury to goods happens after they have been negligently taken by him beyond their point of destination.

The plaintiff took a ticket from York to Darlington by the defendants' railway. Before starting on the journey he handed two water-colour drawings (which were tied together face to face, so that it could be seen that they were pictures of some kind) to the guard, asked him to take care of them, and saw them labelled for Darlington. The pictures were above the value of 10*l.*; but the plaintiff made no declaration of the value. When the train arrived at Darlington he got out, took a fresh ticket for Barnard Castle, and told the porter to see that the drawings were taken out and put in the train by which he was starting. The drawings however were not taken out, but were carried on to Durham, and when they were recovered by the plaintiff had sustained considerable injury:—

Held, by the Queen's Bench Division, that the plaintiff was not entitled to recover for the damage to the drawings. By Blackburn and Field, JJ., on the ground that the defendants were protected by the Carriers Act, which applied to the case of goods negligently carried beyond the point of destination. By Quain, J., on the ground that the Carriers Act did not apply to the case, and that the company must be considered as bailees of the pictures beyond Darlington, but that there was no evidence of negligence to make them liable.

Held, by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the construction put by Blackburn and Field, JJ., on the Carriers Act was correct.

THE first and second counts of the declaration stated that the defendants as carriers of passengers took the plaintiff's luggage beyond Darlington where it was to be delivered, and took insufficient care of the luggage, whereby it was injured.

Third count, trover for drawings belonging to the plaintiff.

Sixth plea, except as to taking the luggage beyond Darlington, that the goods were articles within the Carriers Act, and were not declared under it.

Seventh plea, except, &c., that the goods were not ordinary luggage.

Eighth plea, as to taking the goods beyond Darlington, payment into court of 40*s*.

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Joinder of issue on all the pleas, except the last.

At the trial before Field, J., at the Durham spring assizes, 1875, it appeared that the plaintiff, in July, 1874, took a ticket by the defendants' railway from York to Darlington. He had with him two water-colour drawings tied by a rope face to face. They were upon paper, stretched upon canvas, and glazed; and the canvas was visible at the back. He gave the pictures to the guard, saw them labelled "Darlington," and told him to be careful of them. The pictures were above the value of 10*l.*; but the plaintiff made no declaration of the value. When he arrived at Darlington he took a fresh ticket to Barnard Castle, and asked the porter to take out the pictures and put them into the Barnard Castle train. He was told that all his things had been taken out and put into the Barnard Castle train, and then entered his carriage. The pictures however had not been taken out, but were carried to Durham, and the plaintiff did not receive them till two or three days, and they were then seriously injured, holes having been made in them.

It was admitted that the pictures were contained in a parcel or package within the meaning of the Carriers Act, and it was agreed that the damage done to them should be assessed at 75*l.*, if the plaintiff were entitled to recover, and that the 40*s.* paid into court was enough to answer any damage sustained from their having been carried beyond their destination and detained in consequence.

No question as to whether the defendants were guilty of negligence as bailees was left to the jury, but a verdict was entered for the plaintiff for 75*l.*, with leave to move to enter a nonsuit or verdict for the defendants.

A rule having been obtained accordingly, on the ground that the defendants were protected by the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68 (1), and that the goods were not personal luggage,

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1: "No mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles, or property of the descriptions following (that is to say), gold or silver coin of this realm or any foreign state, &c., paintings, engravings, pictures, &c., contained in any parcel or package which shall have been delivered either to be carried for hire, or to accompany the person of any passenger, in any mail or stage coach, or other public conveyance, when the value of such article or articles or property

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Q. B. D.

Jan. 11. *C. Russell, Q.C.* (*G. Bruce*, with him), shewed cause. The injury to the pictures having occurred after they had been improperly taken beyond Darlington, the point of destination, the company are not protected by the Carriers Act, and are liable. Before the passing of the Act, in *Garnett* v. *Willan* (1), where the proprietors of a mail coach had given notice that they would not be responsible for packages containing specified articles, or which should exceed 5*l.* in value, unless an insurance were paid, it was held that they were liable for an uninsured parcel which was taken out of their coach by one of their servants and left to be forwarded by another coach, as the action was not founded upon anything arising in the course of the carriage of the goods which they had undertaken to convey, but was for doing an act quite inconsistent with that for which they had stipulated. And in *Sleat* v. *Fagg* (2), where there was a similar notice, and a parcel was delivered to be carried by a particular coach, and was sent by a different coach and lost, the carriers were held liable, Abbott, C.J., saying it was not a case of negligent performance of a contract, but a refusal altogether to perform it. *Bodenham* v. *Bennett* (3), where the parcel was carried beyond the place of its destination and was lost, and *Davis* v. *Garrett* (4), where lime was carried in a barge which took fire during an unnecessary deviation, are to the same effect.

[BLACKBURN, J. In each of those cases there was an intentional act on the part of the defendants in sending on or misdelivering the goods. Here there was only negligence.]

In an earlier case, *Ellis* v. *Turner* (5), where shipowners had given notice that they would not be responsible for goods above 10*l.* in value unless extra freight were paid, and received the plaintiff's goods to be carried from Hull to Stockwith, but carried

---

aforesaid contained in such parcel or package, shall exceed the sum of 10*l.* (unless delivered as such and an increased charge accepted)."

By s. 8, nothing in the Act is to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant, in his or their employ, &c.

(1) 5 B. & A. 53.
(2) 5 B. & A. 342.
(3) 4 Price, 31.
(4) 6 Bing. 716.
(5) 8 T. R. 531.

them past Stockwith towards Gainsborough, and the ship sank on the way, Lord Kenyon held without difficulty that the plaintiff was entitled to recover.

[BLACKBURN, J. There also it seems that there was a wilful act on the part of the master of the ship.]

There is no case upon the construction of the Carriers Act which is in point; but the Act was never intended to protect the defendants in a case like the present, where there was a misdelivery of the goods. The words in the Act, "loss or injury to goods" must be limited to loss or injury during the stipulated journey.

[BLACKBURN, J. Why do not the words "loss or injury" cover misdelivery? Is not misdelivery negligence? If the company had given the pictures to a wrong passenger, and he had dropped them, would they be liable?]

Misdelivery is not something incident to the contract of carriage. In *Duff* v. *Budd* (1), it was held that a notice limiting liability for goods delivered to the carriers did not protect from the consequences of a misdelivery.

[BLACKBURN, J. That is a decision on the question of gross negligence, which does not apply to the Carriers Act.]

At any rate, the defendants are liable, as gratuitous bailees, for what happened to the pictures beyond Darlington.

Herschell, Q.C., and *Crompton*, in support of the rule. The defendants are not liable. The Carriers Act was intended to apply to negligence on the part of carriers. Where an article of more than ordinary value was delivered to them, it was thought right that they should be put on their guard, and that if they were not, that they should be exempted from liability in everything incidental to the contract of carriage. If the plaintiff's construction is correct, the protection intended by the statute will be frittered away. In a case where goods were taken out short of their destination, it might as well be said that this was negligence not connected with the contract of carriage, and the protection would be limited to accidents inside the luggage-van. Putting out luggage at the wrong station is the most common form of negligence on the part of a railway company, and it could always be said that the carrier placed the goods where he did not contract to

(1) 3 B. & B. 177.

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Q. B. D.

deliver them. The cases cited for the plaintiff were before the Carriers Act, and are otherwise distinguishable. In each of those cases there was something equivalent to a wilful refusal to perform the contract. But even if the Carriers Act does not apply to anything in the nature of a misdelivery or conversion of the goods; carrying goods beyond their destination cannot be said to be a conversion. The defendants always intended to hold the goods as carriers. The goods were still in their hands as carriers, and were only delivered to different representatives of the same company.

Judgments, Q. B. D.

BLACKBURN, J. In this case, which raises a point of some importance, I think the verdict for the plaintiff should be set aside, and the rule made absolute to enter it for the defendants, on the ground that they were protected by the Carriers Act; the goods being pictures, and there having been no declaration of their value, nor any offer to pay any additional charge for their carriage. The Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), by s. 1, enacts "that no stage-coach proprietor or other common carrier" (under which term a railway company would certainly come) "shall be liable for the loss of, or injury to," certain articles, including pictures above the value of 10*l.*, "unless their value be declared and an increased charge paid." Then, by a subsequent section it is enacted that "nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, . . . or other servant in his or their employ." Taking these two sections—I do not know that it is material to look at any other section—let us see if they apply to the present case. The articles are pictures, and above the value of 10*l.* It is admitted that the plaintiff neither declared the value of the pictures, nor offered to pay the additional charge for carriage. What happened was, the defendants carried the pictures from York to Darlington as the plaintiff's personal luggage. They were taken to be carried with the plaintiff to Darlington, where he intended to get out, and though pictures would not properly be personal luggage, yet the company, with knowledge of what they were, had taken and treated them as personal luggage. But then comes

the Carriers Act, which says they shall not be liable for loss or injury to the pictures, and the question is, whether what happened was a loss or injury within the meaning of the Carriers Act.

But first we must consider whether the defendants were liable as bailees. When the pictures arrived at Darlington, the plaintiff applied to the servants of the company to transfer his luggage to the Barnard Castle train; and without any default on his part he took what he believed to be all his luggage, but which did not include these pictures, for they remained in the guard's van, where they had been put for greater safety, and for this reason were not delivered to him. If it had been the plaintiff's fault that he did not get his luggage, this would have raised a different subject for consideration; but we must take it that he did not get the luggage owing to the negligence of the defendants' servants, and not owing to any negligence of his own. It might have been only a question of delay, but, at any rate the pictures were not taken out at Darlington, negligently no doubt, and were carried on to Durham. This journey was not a part of the carriage of the pictures to Darlington, but, owing to a mistake whilst in the custody of the defendants, they were carried on. The defendants ought, therefore, to have kept them and taken reasonable care of them until they could communicate with the plaintiff. They ought at least to have brought them back again, but during the journey they were exposed to risk which was not in the contemplation of the parties, or at any rate of the plaintiff, and during that time the damage or injury was occasioned. Now the company, I have said, were, as bailees of the goods from the time they were left behind at Darlington, bound to take reasonable care of them. When they carried them on they were still bailees, and had any case been made out that the injury they sustained at Durham was the result of a want of that care which a bailee, not perhaps a voluntary bailee, but a bailee owing to his own mistake, and who was therefore bound to take reasonable care, ought to have taken, the case would have been different altogether. But I cannot think that any such case is made out. There is no evidence of how the damage arose, except the fact that holes were driven through the pictures. This could not of itself require very great violence. The plaintiff's counsel does seem at the trial to have suggested

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Judgments, Q. B. D.

that there was negligence, but the question was not left to the jury. My Brother Field says that it was arranged that the Court should draw inferences of fact, but I cannot draw the inference, from the fact that this drawing on paper was carried to Durham and had a hole made through it on the way, that it was only damaged through gross negligence. On the contrary, it seems to me that an unprotected picture of this kind, if not put in a case, would be liable to have its glass smashed or otherwise injured without any gross negligence.

Then we come back to the other point, whether the Carriers Act protects the defendants. It is said that loss or injury within the Act must be some loss or injury while the goods are being carried on their journey, and that here the company had possession of the goods owing to their being negligently taken on and kept in their hands, not with the object of sending them to Darlington, but by mistake. It is said that, under these circumstances the company cannot be protected, the argument being that the Carriers Act is no protection where the parties are carrying the goods by mistake, and not as part of the intended journey. I cannot think that this is the law. I have carefully read the Act, and it seems to me that carriers are protected from such a loss or injury. If the carrier or those for whom he is responsible wilfully damage the goods or dispose of them, or convert them to his or their own use, or if a third person claims them, and the carrier, knowing what he is about, says, "Very well; if you will give me an indemnity, you shall have the goods," in all these cases the carrier would be responsible, because it is a loss or injury for which he would be liable in trover. But in a case like the present, where there is not wilful misfeasance, when you look at the terms of the Act of Parliament, it is intended that the large responsibility of the carrier was not to continue in respect of gold, silver, and other valuable goods, unless he received an adequate remuneration. It was urged by counsel for the plaintiff that in several cases it has been decided that if a carrier delivered goods to the wrong person by mistake, this was a conversion, and that it followed therefore that the Carriers Act did not protect him. I do not think this follows at all. It seems to me that if the Act protects the carrier from loss or injury, it should protect him whether the liability is charged

in an action on the case, or in an action of trover, or in an action on the contract. I think this is fortified by considering that he is still liable for anything done feloniously. If it could be maintained that carriers were not protected where the act was done negligently, so that a railway company were to be answerable if their servant honestly forwards goods to the wrong person, it would be unnecessary to say that they are to be answerable if the servant hands them to another for the purpose of stealing them.

I think the case of *Hinton* v. *Dibdin* (1) goes a great way. The point there decided was that, though the negligence of the servants was ever so gross, still, as long as it was merely negligence, the railway company were not liable. It seems to me the reasoning there comes to this, unless it were proved that the misdelivery was intentional, the case is within the Act. It is, therefore, unnecessary, in the present case, to consider whether there was negligence on the part of the defendants, so long as the case is within the Act. The rule will be made absolute.

QUAIN, J. I have come to the same conclusion, though I do not quite concur in the grounds on which my learned Brother has founded his judgment. In the first place, the injury was sustained after the goods were by mistake improperly carried from Darlington towards Durham, and therefore were not being carried at the time of the loss under any bailment by the plaintiff. It strikes me, therefore, that s. 1 of the Act does not apply to such a loss as this, for the words are, that no carrier shall be liable for the loss of or injury to any article "in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger." Now, on this journey from Darlington to Durham, they were not delivered to be carried for hire or to accompany the passenger. The section proceeds: "unless the value be declared and paid." My impression is, that the loss, in order to bring the case within the Act, must be a loss which occurred to the goods after they were delivered to the common carrier to be carried for hire, or to accompany the person of the passenger, where he might have protected himself by paying for the additional value of the goods. It strikes me, therefore, that, at

(1) 2 Q. B. 646.

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Judgments, Q. B. D.

the time of the injury to the pictures, they were not being carried under any bailment at all; they were not delivered to the company to be carried from Darlington to Durham and then brought back again to Darlington, but they had been carried beyond the limits of the stipulated journey, and were in possession of the defendants under different conditions altogether.

On the other part of the case the evidence shews that the pictures were in the defendants' custody at Darlington, and while in their custody the injury occurred. My Brother Field reports that there was no evidence of, and he was not asked to leave to the jury any question of, want of reasonable care on the part of the defendants. This being the case, though I think the Carriers Act does not apply, still, as there was no evidence of want of reasonable care by the defendants as bailees, they are entitled to the verdict.

FIELD, J. I think that this rule should be made absolute, and I prefer to place my judgment on the ground that the defendants were entitled to the protection of the Carriers Act. At the trial I came to the conclusion that there was neither assertion nor proof of negligence on the part of the defendants, so as to render them liable as bailees. The point, therefore, left for our decision is, whether in carrying on the pictures to Durham the railway company had deprived themselves of the benefit of the Carriers Act. It seems to me that they had not. What happened was this. In the first place, the pictures had been taken by the defendants to accompany the plaintiff on his journey, and they were taken in the van as far as Darlington. Therefore the defendants had possession of the pictures with a request, which they acceded to, that the pictures should accompany the plaintiff. On getting out at Darlington he entrusted the guard with the duty of placing the pictures in the train for the further journey to Barnard Castle, but instead of taking them out the guard allowed them to remain in the van, and so they were sent on to Durham. It seems to me, assuming (as I was prepared to do) that certain conduct amounting to misfeasance would deprive the company of the protection of the Act, that no such case exists here. No doubt the goods were carried beyond the limits of the prescribed

journey, and no doubt they were so carried by the negligent act of the defendants' servant, whilst they still assumed to be acting in the character of carriers. But this seems to me not to disentitle them to the protection of the Act. I think, therefore, that the rule should be made absolute.

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Rule absolute.

Judgments, Q. B. D.

The plaintiff having appealed,

Feb. 15. *C. Russell, Q.C.* (*Bruce* with him), for the plaintiff, urged the same arguments as in the Court below.

C. A.

Herschell, Q.C. (*Crompton* with him), for the defendants, was not heard.

JAMES, L.J. The only point in this case is, whether as to these pictures the defendants were within the protection of the Carriers Act, and the only facts before us are, that the pictures were handed to the company, who undertook to carry them for the plaintiff and deliver them to him at Darlington. They were carried to Durham, and were injured through the negligence of the company's servants. The answer of the company is, that, under the Carriers Act, they were not liable for the injury to the pictures unless their value was declared and an increased charge paid, and that their value had not been declared. I think it quite clear that the injury to the pictures was while they were in the possession of the defendants as carriers, and that the plaintiff is not entitled to recover.

Judgments, C. A.

MELLISH, L.J. I am of the same opinion. The question to be determined by us is whether, if goods, such as pictures, within the protection of the Carriers Act, are handed to a carrier, and then by the negligence of the carrier are carried beyond the point of destination and injured, this is an injury within the meaning of the Act. I think it is. If not, the Carriers Act would really be no protection at all: for in the majority of cases of loss or injury to goods, the fact is that the goods have not arrived at the station for which they were destined, but have been put out short of it or carried beyond it, and if the carrier is liable in such cases, the protection of the Act would be reduced to nothing. It is scarcely

1876

MORRITT v. NORTH EASTERN RAILWAY CO.

Judgments, C. A.

necessary to decide upon the liability of the company for injury to goods after it has been discovered that they have been taken beyond their destination, for there is really no evidence that the damage happened after they had been sent beyond Darlington. And even if the company are under any special liability as involuntary bailees, there is no evidence of such negligence as would make them liable.

BAGGALLAY, J.A. I am of the same opinion. The contract was to carry the pictures to Darlington, and if they had never been heard of again, there would have been no question but that the company were protected. I do not see that it should make any difference that they were carried on to Durham and brought back in a damaged condition. It only shews that the negligence consisted in not taking the pictures out of the train.

CLEASBY, B. I am of the same opinion. I have nothing to add as to the Act, but I can imagine that there may be cases where the goods might be taken out by the carriers and retained by them in such a manner as to put them under the liability of taking reasonable care as involuntary bailees.

GROVE, J. I am of the same opinion. I entirely concur with what Lord Justice Mellish has said, that if the contention of the plaintiff is right, it would in most cases deprive the company of the protection of the Carriers Act.

Judgment affirmed.

Solicitors for plaintiff: *Ridsdale & Co.*

Solicitors for defendants: *Maples, Teesdale, & Co.*

DE HART *v.* STEVENSON AND OTHERS. 1876 *Feb.* 23.

Practice—Parties to Action—One person suing for others having same interest—Order XVI., Rules 9, 13, *Schedule to* 38 & 39 *Vict. c.* 77*—Security for Costs.*

A writ was issued by the plaintiff "on behalf of himself and numerous parties having the same interest," under Order XVI., Rule 9. The claim was by the plaintiff, on behalf of himself and the other owners of a ship, against the defendants for freight and dues for the use of the ship.

The defendants applied to add the names of the other owners as plaintiffs, under Order XVI., Rule 13, on the ground that the case was not within Rule 9, and also in order that the defendants might have the liability of the other owners, as plaintiffs, for costs:—

Held, that the action was rightly brought by a single plaintiff under Rule 9, and that the case was not within Rule 13.

WRIT of summons issued by the plaintiff "on behalf of himself and numerous parties having the same interest" [under Order XVI., Rule 9, sch. to 38 & 39 Vict. c. 77]. (1) The claim was by the plaintiff, on behalf of himself and the other owners of a ship, against the defendants for freight and dues for the use of the ship.

H. Shield moved for an order to add as plaintiffs the names of the other owners. He contended that such an action was not within Order XVI., Rule 9; and, secondly, that the Court would add the names under Order XVI., Rule 13. (2) The object, he admitted, was to secure to the defendants the liability of the other parties, as plaintiffs, for costs.

(1) Order XVI., Rule 9. "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested."

(2) Order XVI., Rule 13. "No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controvery so far as regards the rights and interests of the parties actually before it. The Court or a judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. . . . ."

1876

DE HART v. STEVENSON.

Crompton appeared for the plaintiff, but was not heard.

BLACKBURN, J. The case is clearly within Rule 9; secondly, Rule 13 does not apply, as it is not shewn that the presence of the other plaintiffs is necessary in order to enable the Court effectually and completely to adjudicate and settle the questions involved in the action. As to security for costs, if a case were made out (which it is not in the present case), possibly the Court may have power to interfere and order security.

QUAIN and FIELD, JJ., concurred.

Motion refused, with costs.

Solicitors for plaintiff: *Williamson, Hill, & Co., for R. P. & H. Philipson, Newcastle-on-Tyne.*

Solicitors for defendants: *Wilkins & Blyth.*

Jan. 24.

TARRY *v.* ASHTON.

Nuisance to Highway, Action for Injury caused by—Duty of Person hanging a Lamp over the Highway, so as to become dangerous if not in good Repair, to keep it in Repair—Principal and Agent.

Defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As plaintiff was walking along, in November, the lamp fell on her and injured her. It appeared in evidence that in the previous August defendant employed an experienced gasfitter, C., to put this lamp, &c., in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron or bracket from which the lamp hung, and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination it turned out that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of C., but no negligence on the part of defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused it to fall:—

Held, that the plaintiff was entitled to the verdict. By Lush and Quain, JJ., on the ground, that if a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the

passengers; and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. By Blackburn, J., on the ground that, under the circumstances of the case, it was shewn that defendant knew that the lamp wanted repair in August, and it was his duty, therefore, to put it in reasonable repair, and the person he employed having failed to do so, defendant was liable for the consequences of the breach of duty.

1876

TARRY v. ASHTON.

DECLARATION that defendant was possessed of a messuage and premises, and of a lamp projecting from, and fastened to, the messuage and premises, and overhanging a public highway; and defendant conducted himself so negligently and unskilfully in the management and maintenance of the lamp and of the pipes which conveyed the gas to the lamp, and in suffering the same to be out of repair and insecure, and in and about certain repairs which were being done on the lamp-iron or bracket, and pipes, and so wrongfully and improperly omitted to take means to prevent the lamp from falling upon persons passing along the highway, or to give them warning in that behalf, that by reason of the premises the lamp fell down upon the plaintiff and struck her as she was lawfully passing along the highway.

Second count: That defendant was possessed of a messuage and premises immediately adjoining the public highway, and of a lamp projecting from and fastened to the messuage and premises, and overhanging the highway; and defendant wrongfully suffered the lamp and the lamp-iron or bracket which supported the same to become and continue to be in an insecure state and out of repair, so as to be dangerous to, and likely to fall upon and injure, persons passing along the highway; and plaintiff, as she was lawfully passing along the highway, was struck by the lamp, which fell upon and injured her.

Pleas: Not guilty; and that defendant was not possessed of the premises, as alleged. Issue joined.

At the trial before Quain, J., at the sittings in London after Easter Term, 1875, it appeared that the plaintiff was walking along the Strand in front of the defendant's house on the afternoon of the 16th of November, 1874, when a large lamp, which was suspended from the front of the house and projected several feet across the pavement, and weighed 40lbs. or 50lbs., fell upon her and injured her severely. At the time of the accident a man named Weaver, in the employ of the defendant, was engaged

1876

TARRY v. ASHTON.

blowing the water out of the gas pipes; he had raised a ladder against the lamp-iron or bracket from which the lamp hung, and the afternoon being wet and windy, on Weaver mounting the ladder it slipped, and he, to save himself from falling, caught hold of the lamp-iron; this shook the lamp, and its fastenings broke, and it fell on the plaintiff. In the August previous the defendant, having lately come into occupation as tenant of the house, and knowing the lamps, &c., to be of some age, employed Chappell, an experienced gasfitter, to examine them and put them in thorough repair. But on examination of the lamp after the accident, it appeared that the breakage was caused by general decay under the cup and ball, which connected the lamp with the lamp-iron or bracket.

The jury found, that there was no negligence on the part of the defendant personally, nor on the part of Weaver; but there was negligence in Chappell, "the defendant's servant." That the lamp was out of repair through general decay, but not to the knowledge of the defendant. That the immediate cause of the fall of the lamp was the slipping of the ladder; but that if the lamp had been in good repair the slipping of the ladder would not have caused the lamp to fall. And they assessed the damages at 40*l.*

On these findings, a verdict was entered for the plaintiff for 40*l.*, with leave to move to enter a verdict for the defendant, or a nonsuit, if on the findings of the jury the judge ought to have nonsuited, or directed a verdict for the defendant.

A rule having been obtained accordingly,

A. Collins, and *Poulter*, shewed cause. It must be admitted that Chappell was not the defendant's servant, as the jury have taken upon themselves to find; but that is quite immaterial. The second count charges in effect a nuisance, and the defendant, without any knowledge or negligence on his part, was liable, on the other facts found by the jury, for a nuisance. In *Quarman* v. *Burnett* (1), Parke, B., in delivering the judgment of the Court, distinguishes between the liabilities in connection with moveable chattels and with fixed property; and says: "The rule of law may be, that when a man is in possession of fixed property, he

(1) 6 M. & W. 499, 510.

must take care that his property is so used or managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with him or their servants. Such injuries are in the nature of nuisances." In *Reg.* v. *Watson* (1), the tenant at will of a house was held liable, as the occupier, for suffering it to be in such a dilapidated state as to be dangerous to the passengers along the adjoining highway. That is precisely this case.

[BLACKBURN, J. Was the lamp in such a state as to be a nuisance, if so, was it to the knowledge of the defendant?]

It turned out to be in a dangerous state, though not apparently so. Knowledge on the part of the occupier is immaterial. In *Reg.* v. *Stephens* (2), the owner and occupier of a slate quarry, worked for his profit by his agents, was held liable for a nuisance caused by the acts of the workmen, though done without his knowledge and contrary to his general orders. *Rex* v. *Medley* (3) is to the same effect. *Barnes* v. *Ward* (4), and *Hadley* v. *Taylor* (5), are similar cases of civil actions.

[BLACKBURN, J. The defendants there had knowledge.]

In *Pickard* v. *Smith* (6), the occupier of premises was held liable for injury caused by the trap of the coal cellar belonging to the premises being negligently left open, not by his own servants, but by the servants of the coal merchant. That is a stronger case than the present. *Hole* v. *Sittingbourne Ry. Co.* (7) shews that where there is a duty to be performed, the person on whom it lies cannot get out of the liability for the breach of that duty by shewing that the breach was by the servants of a competent contractor, whom he employed to perform the duty. If a man for his own purposes hangs up a thing in a position to be dangerous if not kept in good repair, he must keep it in good repair at his peril: *Fletcher* v. *Rylands.* (8)

McIntyre, Q.C., and *Darling*, in support of the rule. The defendant has been guilty of no negligence.

(1) 2 Ld. Raym. 856; 1 Salk. 356, nom. *Reg.* v. *Watts.*
(2) Law Rep. 1 Q. B. 702.
(3) 6 C. & P. 292.
(4) 9 C. B. 392; 19 L. J. (C.P.) 195.
(5) Law Rep. 1 C. P. 53.
(6) 10 C. B. (N.S.) 470.
(7) 6 H. & N. 488; 30 L. J. (Ex.) 81.
(8) Law Rep. 3 H. L. 330.

1876

TARRY v. ASHTON.

[LUSH, J. Negligence is a relative term. The question is, what is the duty of a person who hangs a thing over the highway ?]

To take reasonable precautions that it is in a safe condition by being kept in good repair. This the defendant has done, he did all he could by employing a competent person to repair it in August. He is not answerable for this person's neglect. In none of the cases cited was the defendant held liable where he had no knowledge or means of knowledge of the improper state of the thing. Here the defendant employed Chappell to put the lamp in repair, and for all that appeared it was perfectly safe. *Nichols* v. *Marsland* (1) has qualified *Fletcher* v. *Rylands* (2); it was there held that the defendant, having taken all reasonable care in damming up the water on her land, was not liable for its escape owing to causes beyond her control.

[QUAIN, J., referred to *Francis* v. *Cockrell*. (3)]

That was a case of contract. In *Searle* v. *Laverick* (4) that case was distinguished, and it was decided that such a kind of warranty as was held to exist in *Francis* v. *Cockrell* (3) was not to be extended; and the defendant, a bailee, was held not to warrant the absolute security of a building in which the plaintiff's carriage was put; and not to be responsible for the negligence of the builder whom he employed. Neither can the defendant here be held responsible for the negligence of his gasfitter, it being admitted at the trial that Chappell was a competent and proper person to employ.

BLACKBURN, J. I desire to decide nothing beyond what the circumstances of the case require; and on the facts of the case, I am of opinion that the plaintiff is entitled to keep the verdict. It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the

(1) Law Rep. 10 Ex. 255.
(2) Law Rep. 3 H. L. 330.
(3) Law Rep. 5 Q. B. 184; 501.
(4) Law Rep. 9 Q. B. 122.

1876

TABRY v. ASHTON.

nuisance. This much is clearly decided by *Reg.* v. *Watson* (1), for the defendant was there held liable for not repairing his house which was on a highway and was ruinous and like to fall down, on the ground that as occupier he was bound to keep the house so as not to be a nuisance. As I have said, I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowlege of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable. But if he did know of the defect, and neglect to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down. So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences.

Now in the present case there is ample evidence that in August the defendant was aware that the lamp might be getting out of repair, and, it being his duty to put it in repair, he employs Chappell to do so. We must assume, I think, that Chappell was a proper person to employ; and I may observe that he was clearly not the defendant's servant, as the jury say, but an independent contractor. But it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty to have the lamp set right; it was not set right.

The rule must be discharged.

(1) 2 Ld. Raym. 856; 1 Salk. 356.

1876

TARRY v. ASHTON.

LUSH, J. The question is, what is the duty of a person having a lamp projecting from his premises over the highway for his own purposes? Is it his duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to shew that the duty must be in the first proposition. A person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous; and he cannot get rid of the liability for not having so kept it by saying he employed a proper person to put it in repair.

QUAIN, J. I am of the same opinion. What is the duty of the defendant under the circumstances to the public? He is a man who puts up or maintains a lamp always projecting from his premises over the public footpath, and it is his duty to keep it in such a state as not to prejudice the public. In *Reg.* v. *Watson* (1) "it was adjudged that the defendant, as tenant at will only, ought to repair the house, so that the public be not prejudiced by the want of repairs." So here the duty of the defendant was to keep the lamp in repair, so as not to let the public be prejudiced. It is quite clear on the facts that the plaintiff, one of the public, has been prejudiced, and the defendant, in answer to this charge of a breach of duty to the public, cannot be allowed to ride off by saying, I employed a competent person to do the repairs, and it is his fault that they were not properly done. No case in favour of such a proposition has been cited for the defendant; and it seems to me there is good reason why it cannot be found. I am clearly of opinion that the defendant was bound to maintain the lamp in a proper state of repair, so that the public should not be prejudiced by his neglect; and he is liable to the plaintiff for the injury she has sustained owing to his breach of duty.

Rule discharged. (2)

Solicitor for plaintiff: *L. W. Gregory.*
Solicitor for defendant: *E. Froggart.*

(1) 2 Ld. Raym. 856; 1 Salk. 356.

(2) See the next case.

BOWER *v.* PEATE.

1876
Feb. 25.

Principal and Agent or Contractor—Liability of Principal for Breach of Duty intrusted to Agent—Adjoining Landowners, Liability of.

A man,—who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented,—is bound to see to the doing of that which is necessary to prevent the mischief; and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.

Plaintiff and defendant were respective owners of two adjoining houses, plaintiff being entitled to the support, for his house, of defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house; the contractor undertook the risk of supporting plaintiff's house, as far as might be necessary, during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured, in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—

Held, on the above principle, that defendant was liable, even if the undertaking as to risk, &c., had amounted,—which it did not,—to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support plaintiff's house.

DECLARATION, alleging, in the first count, that the plaintiff was possessed of land with a house thereon, and was entitled to have the same supported by the land adjacent thereto; and the defendant wrongfully removed the adjacent land, without leaving sufficient support for the plaintiff's land and house, whereby the land gave way and the house was injured.

Fourth count: That the defendant by his agents and workmen conducted himself so negligently in excavating the ground adjacent to the plaintiff's house for the rebuilding of a house of the defendant, and in underpinning the party-wall, and removing a part of the same, that the plaintiff's house was damaged.

Pleas: 1st, denial of the plaintiff's possession; 2nd, to the first count, denial of the plaintiff's right to support; 3rd, not guilty.

Issue thereon.

At the trial, before Field, J., at the Liverpool spring assizes, 1875, a verdict was entered for the plaintiff, upon facts which are sufficiently stated in the judgment of the Court, with leave to

1876

BOWER v. PEATE.

move to enter the verdict for the defendant, on the ground that the defendant's contractor, and not the defendant, was liable, if any one.

A rule having been obtained accordingly,

Jan. 19. *H. H. Bremner* (*Day, Q.C.*, with him) shewed cause. An employer is liable for damage arising, as here, from the act itself which the contractor is employed to do: *Hole* v. *Sittingbourne Ry. Co.* (1)

[FIELD, J., referred to *Ellis* v. *Sheffield Gas Co.* (2)]

The fact that injury would have been prevented if the contractor had provided substituted support does not take away the defendant's liability: for a person employing a contractor to perform a duty cast upon himself is responsible for the contractor's negligence in performing it: *Gray* v. *Pullen.* (3)

[FIELD, J. Is there any case in which the defendant has been held liable where he had inserted, as in this case, a stipulation that the contractor should set right any mischief caused by the work, the work being lawful in itself?]

There is no such case to be found. But a contract between the defendant and his contractor for his own protection cannot affect the question. The law is clear that a person cannot transfer to a contractor the duty of guarding against injurious consequences of an act ordered by himself: *Pickard* v. *Smith.* (4) If a man does a thing, not unlawful in itself, yet likely to cause injury to another, he is responsible for the consequences: *Fletcher* v. *Rylands.* (5)

Herschell, Q.C. (*T. H. James* with him), in support of the rule. The principle is well settled that a person employing a contractor to do a lawful act is not liable for his doing it improperly: *Pickard* v. *Smith.* (4) There is nothing unlawful in excavating one's own land unless damage is caused to one's neighbour, and not until the damage is caused: *Bonomi* v. *Backhouse.* (6) The fact that the contractor was employed to excavate only upon

(1) 6 H. & N. 488; 30 L. J. (Ex.) 81.

(2) 2 E. & B. 767; 23 L. J. (Q.B.) 42. 18 Jur 146

(3) 5 B. & S. 970, 981; 32 L. J. (Q.B.) 169; 34 L. J. (Q.B.) 265.

(4) 10 C. B. (N.S.) 470, 480.

(5) Law Rep. 3 H. L. 330.

(6) 9 H. L. C. 503; 34 L. J. (Q.B.) 181. 7 Jur NS 809

shoring up, so as to give substituted support, puts the lawfulness of the act ordered beyond question, even if in the absence of a stipulation as to substituted support the act ordered could be held unlawful.

[FIELD, J. That does not meet the whole of the argument for the plaintiff. *Pickard* v. *Smith* (1) lays down that where the contractor is entrusted with a duty incumbent on his employer, and neglects its fulfilment, the employer is responsible.]

That refers to a duty properly so called, such as not to have a nuisance on one's land; and, moreover, it is a mere dictum. All the cases which have been cited, *Hole* v. *Sittingbourne Ry. Co.* (2), *Ellis* v. *Sheffield Gas Co.* (3), *Gray* v. *Pullen* (4), and *Pickard* v. *Smith* (5), are distinguishable, on the ground that that for which the defendant in those cases was held responsible was clearly unlawful as a nuisance. Although the dicta in *Pickard* v. *Smith* (1) seem to go farther, it may be doubted whether even they, if they are construed with reference to the facts of the case, really do so.

[MELLOR, J., referred to Rolle's Abr. Trespass (I.), pl. 1, and *Wyatt* v. *Harrison* (6), as tending to shew that the act ordered by the plaintiff was lawful in itself.]

Cur. adv. vult.

Feb. 25. The judgment of the Court (Cockburn, C.J., Mellor and Field, JJ.) was delivered by

COCKBURN, C.J. (7) The facts of this case, which involves a point of considerable importance, were as follows:—

The plaintiff and defendant were the owners and occupiers of two adjoining houses, and it appeared that, prior to the rebuilding of the defendant's house, as hereinafter mentioned, the walls and foundations of the plaintiff's house went to a lower level than those of the defendant's. The defendant, having determined to pull down his old house and build another on the same site, proposed to carry the foundations and walls of his new house to a lower depth than

(1) 10 C. B. (N.S.) 470, at p. 480.
(2) 6 H. & N. 488; 30 L. J. (Ex.) 81.
(3) 2 E. & B. 767; 23 L. J. (Q.B.)
42. 18 Jur 146
(4) 5 B. & S. 970, 981; 32 L. J. (Q.B.) 169; 34 L. J. (Q.B.) 265.
(5) 10 C. B. (N.S.) 470.
(6) 3 B. & Ad. 871.
(7) The judgment was read by Field, J.

Z 2

1876

BOWER v. PEATE.

those of the plaintiff; for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. In order to do this without injury to the plaintiff's house the well-known practice of underpinning, or some other safe mode of supporting or shoring the plaintiff's soil and walls during the operations, would, as was well known, have to be resorted to.

For the purpose of this rebuilding the house and executing the other necessary works, the defendant entered into a contract with a builder named Rae, by which Rae contracted to do all the necessary works. The contract contained the following clause:—"And the said Thomas Rae further agrees to take upon himself the risk and responsibility of shoring and supporting, as far as may be necessary, the adjoining buildings affected by this alteration during the progress of the works, and to make good any damage which may be sustained by the said buildings during the progress or in consequence of the said works hereby contracted for, and to satisfy any claims for compensation arising therefrom which may be substantiated." (1)

After the execution of this contract Rae, the contractor, pulled down the defendant's house, and excavated the soil to a lower depth than the foundation of the walls of the plaintiff's house, and rebuilt the defendant's house. But owing to defective underpinning, or want of other support to the plaintiff's soil and walls, in the course of these operations, injuries occurred to the plaintiff's house which gave rise to the present action.

No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house; nor was it doubted that the injuries to the house of which the plaintiff complained had been occasioned by the removal of such soil in the execution of the defendant's works. But it was contended that the defendant, having committed the execu-

(1) By the contract the contractor undertook to do the works according to a specification and plans, and in the specification was the following clause: "6. The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility, and to make good any damage occurring thereto."

tion of the work to a contractor, both as regarded the taking down and rebuilding his house, and the measures necessary for the protection of the adjoining house, the contractor, and not the defendant, became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus: According to the doctrine in *Bonomi* v. *Backhouse* (1), the taking away the soil, to the support of which an adjoining owner is entitled, is not in se wrongful. It only becomes so when followed by injurious consequences to the neighbour. And if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here, the defendant, in one and the same contract, employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorized him to do the former only on condition of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instructions of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. The injuries complained of have arisen from the negligence of the contractor alone. The defendant is, therefore, entitled to the benefit of the general rule, that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor and not the employer is liable.

It appears to us that upon a correct view of the facts, this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do, except so far as was necessary to satisfy his obli-

(1) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

1876

BOWER v. PEATE.

gation to provide the necessary support of the plaintiff's house. In addition to which the defendant stipulates that the contractor shall "take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations," and shall "make good any damage which may be sustained by the said buildings in consequence of the works," and shall "satisfy any claims for compensation arising therefrom." The effect of this is, not that the defendant orders, or stipulates for, any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is therefore not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants.

8 App Cas 446

The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise

1876

BOWER v. PEATE.

unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

It is true, that according to the doctrine in *Bonomi* v. *Backhouse* (1), the removal of the soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, and becomes so only when damage to the adjoining property results; whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises. But it is equally clear that if effectual means of prevention fail to be applied, and damage once results, the act of removal becomes wrongful, and an action can be at once maintained.

In the present instance preventive measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to the plaintiff's house, and the act of removal was therefore wrongful as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the defendant—in other words, was the act of the defendant; and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act. The agent may no doubt be responsible, but the responsibility of the principal is none the less.

The cases of *Pickard* v. *Smith* (2) and *Gray* v. *Pullen* (3) are in point to the present question. In *Pickard* v. *Smith* (2) the defendant, having employed a coal merchant to put coals into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening which had been left open by the negligence of the coal merchant's servants. The law is well stated by Williams, J., in delivering the judgment of the Court. "Un-

(1) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(2) 10 C. B. (N.S.) 470.

(3) 5 B. & S. 970, 981; 32 L. J. (Q.B.) 169; 34 L. J. (Q.B.) 265.

1876

BOWER v. PEATE.

questionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities, which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

In *Gray* v. *Pullen* (1) the Court of Exchequer Chamber carried this principle still further. An Act of Parliament having authorized the cutting a trench across a highway for the purpose of making a drain, but having attached to the exercise of the right the condition of filling up the trench after the drain had been completed, the defendant had employed a contractor to do the whole work. Owing to the negligence of the latter in filling up the trench, the plaintiff's wife had sustained personal injury. It was contended that the contractor alone was liable, and it was so held in this Court, but the Court of Exchequer Chamber held otherwise, and reversed our judgment. It is true that in that case the obligation to make good the road was one imposed by statute; but it can make no difference in point of principle whether the obligation was imposed by statute or existed at law; and the case is therefore an authority for saying that where a

(1) 5 B. & S. 970; 981; 32 L. J. (Q.B.) 169; 34 L. J. (Q.B.) 265.

work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor.

In the recent case of *Tarry* v. *Ashton*, not yet reported (1), where the defendant had become occupier of premises, from which a large lamp was suspended over the highway, and the lamp before he became occupier had become worn out,—and the defendant having notice of this was therefore under an obligation, if he continued to maintain the lamp, to take care that it was not a nuisance to the highway,—and the lamp had fallen down and injured a person passing, this Court, on a like principle, held the defendant liable, though he had employed a contractor to attend to the condition of his lamps.

Both on authority and principle, therefore, we are of opinion that our judgment should be for the plaintiff; and, that, consequently this rule to enter the verdict for the defendant should be discharged.

Rule discharged.

Solicitors for plaintiff: *G. L. P. Eyre & Co., for Cotton, Liverpool.*

Solicitors for defendant: *Gregory, Rowcliffe, & Co., for Payne & Son, Liverpool.*

(1) Since reported, ante, p. 314.

1876
Jan. 15.

BRIGDEN, APPELLANT; HEIGHES, RESPONDENT.

Licence to sell intoxicating Liquors off Premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9—*Grocer's and Draper's Shop communicating with each other—Grocer's Shop shut after prohibited Hours.*

2 QBD 385

The appellant, being licensed to sell by retail intoxicating liquors to be consumed off his premises, was charged with keeping open his premises for the sale of such liquors after ten o'clock at night. He had two shops, a grocer's and a draper's shop, which formed part of his house, and both shops could be entered from the house at the back, as well as by the customers' entrance. The grocery business was carried on in a shop which had an entrance for customers in one street, and the drapery business in a shop which had an entrance for customers in another street. During the day there were means of going, and customers occasionally passed, from one shop to the other, but after ten o'clock shutters or partitions were put up and all means of communication, except through the house, prevented.

It was proved that the draper's shop was kept open till after ten o'clock at night; but that before ten o'clock the openings between the two shops were shut, and the grocer's shop left in darkness. The justices held the charge proved, and convicted the appellant:—

Held, that the conviction was wrong, as there was no evidence that the house was open for the sale of liquor after ten o'clock.

CASE stated by justices of Surrey under 20 & 21 Vict. c. 43.

1. James Brigden of Cobham, Surrey, grocer, draper, and licensed dealer in wines and spirits, the appellant, appeared to an information laid against him by the respondent, for that he on the 12th of June, 1875, in Cobham, being then and there a person duly licensed to sell intoxicating liquors by retail not to be consumed on the premises, did have his premises open for the sale of intoxicating liquors at a time at which they were directed by law to be closed, namely, after the hour of ten o'clock at night.

2. At the hearing it was proved or admitted that the appellant lives in a house at the corner of East Street and Church Street, Cobham, and he has two shops, a grocer's shop and a draper's shop, which form part of his house, and both shops can be entered from the house at the back as well as by the customers' entrance, and it was also admitted or proved that he carries on the several trades or businesses of a grocer and draper on his premises, and that he has a licence for the sale, on such premises, of wines and spirits not to be consumed on such premises.

3. The grocery business is carried on by the appellant in a shop which has an entrance for customers in Church Street. The drapery business is carried on in a shop having an entrance for customers in East Street. During the day there are means of egress and regress from the grocer's shop into the draper's shop, through openings, but after ten o'clock at night shutters or partitions are put up, and all means of communication between the two shops, except through the house of the appellant, as before mentioned, are prevented.

4. As a rule the customers for grocery goods enter the grocer's shop from Church Street, and customers for drapery goods enter the draper's shop from East Street, but occasionally customers requiring both grocery and drapery goods pass from one shop to the other by means of the internal communications until the grocer's shop is closed at ten o'clock in the evening.

5. In the grocer's shop, where the wines and spirits are exposed for sale, notices are affixed that no wines or liquors will be supplied after 10 o'clock p.m.

6. On the day named in the information the respondent, at thirty minutes past ten, entered the appellant's drapery shop, which was then open for the sale of drapery goods, and informed the appellant that he would be summoned for having his premises open during prohibited hours, as he was bound to close the whole of his premises by 10 o'clock p.m.

7. It was proved that before 10 o'clock that night the grocer's shop had been shut and was in darkness, and that the openings between it and the draper's shop had been closed. No wines or spirits are sold or kept in the draper's shop, the same being kept in the grocer's shop only. The appellant's sons serve the customers in the grocer's shop, and his daughters and assistants serve the customers in the drapery shop, but the appellant himself assists occasionally in serving customers in both shops.

8. Under these circumstances it was contended on behalf of the appellant that it had not been proved that the appellant had committed any offence against the 3rd section of 37 & 38 Vict. c. 49, under which the information had been laid, inasmuch as no wines or spirits were kept exposed for sale in the draper's shop, and that no evidence had been given to shew that his premises,

1876

BRIGDEN v. HEIGHES.

namely, the grocer's shop, had been kept open for the sale of wines or spirits during prohibited hours.

The justices,—being of opinion, 1st. That the two shops, being part of the same premises and always open and accessible to one another through the back of the house, could only be taken as one; and, 2nd. That a wooden partition open in the day time and closed at night was not a sufficient division to constitute the grocer's and draper's shop separate premises, and so exempt the appellant from the provisions of the 3rd section of 37 & 38 Vict. c. 49 (1) with regard to the draper's shop,—convicted the appellant of keeping his premises open for the sale of intoxicating liquors during prohibited hours, and fined him the sum of one shilling and costs.

Manisty, Q.C. (*Pearce* with him), for the appellant. The conviction was wrong. The question is what is meant by the term "premises" in 37 & 38 Vict. c. 49, ss. 3 and 9. Does the Act mean that the premises in which the sale of liquor is carried on, and those only, are to be closed after the prohibited hours, or does it mean that the whole of the house is to be shut up?

[MELLOR, J. The justices seem to have proceeded upon the idea that the two shops were the same premises. Is not the question whether there was a sufficient partition one of fact for their consideration?]

The justices evidently thought that, because the partition can be taken down, therefore it is insufficient. But where separate premises are locked up, and nothing is sold in them, it cannot

(1) By 37 & 38 Vict. c. 49, s. 3: "All premises in which intoxicating liquors are sold by retail shall be closed as follows: . . . .

"(3.) If situate elsewhere than in the metropolitan district, or the metropolitan police district, or such town or populous place as aforesaid,

"(c.) On the nights of all other days (except Saturday and Sunday) from 10 until 6 o'clock on the following morning."

By s. 9: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquors or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed on such premises, shall for the first offence be liable to a penalty not exceeding 10*l.*"

be said that the Act is infringed. There is no penalty for merely keeping open a house, the penalty is for selling and exposing for sale. If the conviction is supported, it will compel a dealer in liquor to keep the outer door of his house shut after ten o'clock.

[MELLOR, J. The justices thought, no doubt, that if the draper's shop were allowed to remain open there would be danger of the Act being infringed, but they do not find that any place was kept open for the sale of liquor.]

Pugh, for the respondent. Unless this conviction is supported, the appellant will be able to keep open part of his premises after prohibited hours, though there is a communication between the two shops. The appellant holds a licence to sell liquor to be consumed off the premises, and a customer may go into the draper's shop and ask for a bottle of anything he may require, and get it; for although there is no immediate communication between the two shops one shop may be visited from the other by going through the house. To insist upon positive evidence that the shop was kept open for the sale of liquor would throw great difficulty in the way of the police.

[MELLOR, J. I see nothing in the Act to prevent the occupier and his servants from going in and coming out after ten o'clock. Surely there must be something more than merely keeping the house open.]

The house must be closed as against the public. If the occupier of a house chooses to take out a licence extending to the whole house instead of part of it, he is bound to keep it closed as far as the public are concerned.

[MELLOR, J. The justices have not found that there was any secret contrivance by which customers could get into the grocer's shop, or liquor could be brought into the draper's shop.]

The justices have founded their opinion upon their view of the communication between the two shops.

MELLOR, J. I do not think we need trouble Mr. Manisty to reply. I think the justices have put an erroneous construction on the statute. Sect. 3, which contains the general prohibition against keeping open the premises, is that: "All premises in which intoxicating liquors are sold by retail shall be closed as

1876

BRIGDEN v. HEIGHES.

follows," &c. Here the premises in which the intoxicating liquors were sold by retail were closed, as it appears to me, before or at ten o'clock, the dividing point between the lawful and the unlawful time. I do not agree with the view taken by the justices as to the partition between the two shops. It may or may not be a source of danger; and if there had been any evidence in the case to shew that the closing was a mere colourable compliance with the Act of Parliament, I should think that the conviction was right. But the justices in order to convict must be able to find that the house and premises in which intoxicating liquors were sold, were not really, although apparently, closed; that the closing was a sham, and that the premises were really kept open for people who wish to purchase intoxicating liquor. This is the only construction which I can put on s. 9; and s. 3 apart from s. 9 amounts to nothing, for it is really upon s. 9 that the justices proceeded. The only fact they have proved is that the draper's shop was open when the other shop was closed, although from the circumstances which they state they seem to think it possible that the separation was hardly a sufficient inclosure. That may be, but when such a case arises they must furnish some evidence to shew that the separation is not one in reality. There is nothing of the kind in this case. I do not think that the fact, that the two shops are the same premises in the sense that they are under the same roof, at all affects the case. The access of one shop to the other being closed at night, and this being shewn to have been the case here, I do not see anything to prevent a draper carrying on the business of a grocer, provided that the premises upon which the sale of liquor takes place are sufficiently divided from those in which no liquor is sold at all. I cannot think that any offence has been committed, and I think that we should be straining the Act of Parliament if we supported what was clearly in the minds of the justices; that it is immaterial what closing takes place, provided the premises are under one roof. I, therefore, think that the conviction was wrong.

FIELD, J. I am of the same opinion. The appellant is the occupier of a house which he keeps for three different purposes. He keeps part of it to live in, part of it to sell grocery in, and part

of it to sell drapery in, and in the part where the grocery business is carried on he sells intoxicating liquors. Now, what is he charged with? The information charges him with having kept his premises open for the sale of intoxicating liquors. Is it proved that this is what he did? It seems to me that the contrary is found, because one of the findings in the case is express, that no sale of intoxicating liquors was ever made in the part of the shop set apart for the drapery business, which was the only part of the shop open for the sale of goods at all after ten o'clock. No doubt the occupier might fraudulently keep premises open, and might really and truly be infringing the Act. If there were any ground for supposing that the justices could properly find, or would find as a fact that the premises were kept open for the sale of intoxicating liquors, or if there were a scintilla of evidence to shew that the appellant, under guise of keeping the drapery shop open after ten o'clock, was carrying on drapery business, and at the same time supplying liquor from the adjoining shop, I should think the decision perfectly sound, and that it should stand, in order that such mischief might be prevented. I can find no trace of any such proceeding in the case. It seems to me that the justices thought that, because he had a licence for the whole premises, by keeping open the draper's shop he kept part of the house open for the sale, or exposing for sale, of intoxicating liquors. I think, therefore, that the conviction must be reversed.

Judgment for the appellant.

Solicitor for appellant: *Buckland.*

Solicitors for respondent: *Bell, Crowder, & Greenfield.*

1876
Feb. 25.

THE QUEEN ON THE RELATION OF R. J. ANDREWS *v.* COLLINS.

*Local Board of Health—Election of Members—Invalidity of Votes—Decision of Chairman, when conclusive—*11 & 12 *Vict. c.* 63, *s.* 27.

After the election of a local board under 11 & 12 Vict. c. 63, the chairman proceeded under s. 27 to cast up the votes, and granted his certificate as to who were the successful candidates. On the trial of a quo warranto it appeared that the chairman had by mistake (1) put down votes to one candidate which the voting papers shewed had been given for another; (2) had omitted to reckon votes; and (3) had received as valid votes which were invalid:—

Held, by the whole Court, that the certificate might be impeached as to the first and second class of votes; but, by Mellor and Field, JJ., not as to the last. (Blackburn, J., dissenting on the last point.)

Affirmed 2 Q.B.D. 30. C.A.

QUO WARRANTO to try the title of the defendant to the office of member of the local board of health of Portland, Dorset.

At the trial at the Dorsetshire summer assizes, before Blackburn, J., without a jury, a verdict was directed for the defendant, with leave to move to enter it for the relator.

Jan. 20. *Kingdon, Q.C.*, and *A. Collins*, in support of the rule.

H. T. Cole, Q.C., and *Pinder*, shewed cause.

The facts, arguments, and authorities cited sufficiently appear in the judgment of Blackburn, J.

Cur. adv. vult.

Feb. 25. The following judgments were delivered:—

BLACKBURN, J. This was a quo warranto on the relation of Andrews, calling on the defendant to shew by what title he acted as a member of a local board of health. The plea was, that the defendant was duly elected, and this was traversed. The issue came on for trial before me and a jury at the last assizes at Dorchester. As the case involved a scrutiny, it was agreed that the jury should be dispensed with, and that what I found as facts were to be considered as found by the jury.

It appeared that there were seven vacancies and nine candidates. The voting papers were duly collected and received, and the chairman proceeded on the proper day to ascertain the number of valid votes for each candidate, in pursuance of 11 & 12 Vict.

c. 63, s. 27. (1) The nine candidates consisted of six persons whose election was not disputed, and of Collins, Andrews, and Coombe. The chairman certified that the six others and Collins were duly elected. He made out a list containing the names of the candidates and the number of votes given for each, and the names of the persons elected, which he signed and certified, and delivered it along with the voting and nomination papers to the local board, who, in pursuance of the section, deposited this list, together with the voting papers for public inspection, as required by the section.

The chairman did what, though not in terms required by the Act, was fair. He not merely put down the number of votes for each candidate, but also made out and kept a list by reference to the numbers on the voting papers of the voters whom he had reckoned as voting for each candidate, so that there was no difficulty, in fact,

(1) 11 & 12 Vict. c. 63, s. 25: "Each voter shall write his initials in the voting-paper delivered to him against the name or names of the person or persons (not exceeding the number of persons to be elected) for whom he intends to vote, and shall sign such voting-paper."

Sect. 27: "The chairman shall on the day immediately following the day of the election, and on as many days immediately succeeding as may be necessary, attend at the office of the local board of health, and ascertain the validity of the votes by an examination of the rate-books, and such other books and documents as he may think necessary, and by examining such persons as he may see fit; and he shall cast up such of the votes as he shall find to be valid, and to have been duly given, collected, or received, and ascertain the number of such votes for each candidate; and the candidates to the number to be elected, who, being duly qualified, shall have obtained the greatest number of votes shall be deemed to be elected, and shall be certified as such by the chairman under his hand; and to each person so elected the chairman shall send or deliver notice of such election; and the chairman shall also cause to be made a list containing the names of the candidates together with (in case of a contest) the number of votes given for each, and the names of the persons elected, and shall sign and certify the same, and shall deliver such list, together with the nomination and voting-paper (sic) which he shall have received, to the local board of health at their first or next meeting, as the case may be, who shall cause the same to be deposited in their office, and the same shall, during office hours thereat, be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward; and the chairman shall cause such list to be printed and copies thereof to be affixed at the usual places for affixing notices of parochial business within the parts for which the election shall have been made."

1876

THE QUEEN v. COLLINS.

in ascertaining how he made out the majority. According to this list, the six persons whose elections were not disputed had most votes. Collins had 382 votes; Andrews and Coombe, 579 votes each. If the certificate was conclusive, Collins was entitled to the verdict. Subject to objection on both sides, evidence was received of three classes of mistakes. It was agreed that no inquiry should be made as to Coombe's votes, and that if Collins had a majority over Andrews, the verdict should be for him.

The counsel for the relator proceeded to prove what may be called clerical errors, by shewing that votes which by the voting papers appeared not to have been given for Collins, had been, as appeared by the list, by mistake put down for him; and that votes which, as it appeared by the voting papers, had been given for Andrews, had, as appeared by the list, not been put down for him, but for some one else. The counsel for the defendant shewed that there were similar blunders made with respect to Andrews. On the balance of these mistakes Andrews had three in his favour, shewing an equality of votes between him and Collins. The counsel for the relator then shewed a second kind of mistake. One voting paper had been mislaid, and was not reckoned at all. It was found next day in the room, and proved to be a vote in favour of Andrews. This, if properly received, put Andrews in a majority of one over Collins. The counsel for the defendant then gave evidence of a third kind of mistake. He proved that one of the voting papers received, and, as it appeared by the list, reckoned for Andrews, was a vote by a person who could not write, and was wholly written and signed in his name by another person. It was not alleged that there was any intended fraud in this, but the vote was bad under s. 25. Another vote, which also was reckoned for Andrews, was that of a person who had not been rated, nor paid rates, and this vote was bad under s. 20. The chairman had not had his attention called to either of these two last votes, and consequently did not examine any person as to the genuineness of the signatures in the first case, or the rate books as to the last, or, in point of fact, come to any conclusion as to the validity of those votes before receiving them, though, if his attention had been called to them, he had power, under s. 27, to have investigated the matter. If evidence of this kind of mistake was admissible, Collins was

again in a majority over Andrews. No further evidence was offered on either side.

The counsel for the defendant contended that the certificate of the chairman was conclusive, and that no evidence of any mistake on his part was admissible; but that, if evidence of any one kind of mistake could be shewn, all three sorts might be shewn.

The counsel for the relator contended that the certificate might be impeached by shewing any errors in the mechanical process of reckoning and casting up the votes, but that no error could be shewn in receiving votes as valid as to which he might have made a judicial, or at least quasi judicial, investigation, though an ex parte one.

I directed a verdict for the defendant, reserving to the relator leave to move, with some arrangements as to appealing which it is not necessary now to mention. A rule was obtained, which was argued before my Brothers Mellor, Field, and myself, when the same points which were made at the trial were again stated.

The case of *Reg.* v. *Cross* (1) was cited. In that case the election of the defendant was questioned, on the ground that the election was held before a person who was not the chairman. The issue taken was like this, whether the defendant was duly elected. It was proved that the person who held the election was duly appointed as deputy to the chairman. Then the counsel for the relator said that the defendant, to prove his election, must affirmatively prove that he had a majority of votes, and that the certificate was not even evidence of his having had such a majority. Lord Campbell, C.J., very properly overruled this objection. In doing so, he is reported to have said that the language of this section made the certificate *conclusive*. It is very probable that he did use such language, but the point was not before him, and the case can hardly be considered as shewing his deliberate opinion. At most, the opinion of Lord Campbell was but a nisi prius decision, and as, from the nature of the evidence and the point really raised, it was not necessary for the decision of the case, it could not be reviewed in banc, and is, therefore, of less weight as an authority.

It was decided, in *Reg* v. *Backhouse* (2), that the duties of the chairman were so far of a judicial nature that he could not dele-

(1) 19 L. T. 35. (2) Law Rep. 2 Q. B. 16.

1876

THE QUEEN v. COLLINS.

gate them, except in the manner allowed by the statute. And even if there was no decision to that effect, I should not entertain any doubt that such was the law. But it does not follow that his decision was final and incontrovertible. The duties of the mayor of a corporation acting as returning officer at the election of a councillor are to this extent judicial: *Reg.* v. *Owens* (1); *Reg.* v. *White* (2); yet his return may be questioned on quo warranto. The duties of the mayor and assessors revising the burgess list under 5 & 6 Wm. 4, c. 75, s. 18, are beyond doubt judicial. There have been several quo warrantos at least, moved for to try the right to be on the burgess roll: see *Reg.* v. *Anderson* (3); *Re Milner* (4), without any objection being raised on the ground that their decision was final. I do not find any reported case in which the burgess was actually ousted, but the objection lay on the surface, and if it had been thought good, would surely have been taken.

No doubt the legislature may make any tribunal they please the final judges of any matter they please; but I do not think they sufficiently express an intention to make the decision of a returning officer final, merely by entrusting him with some powers of a judicial or quasi judicial nature. It is a question in each case, on the construction of the particular statute, whether they have done so or not. If this be correct the question for our decision depends entirely on the true construction of s. 27 of 11 & 12 Vict. c. 63, and does not, I think, admit of much elucidation by argument. It seems to me primâ facie unlikely that the legislature should intend to make the decision of the chairman on an inquiry made ex parte and in the absence of the parties interested, final and conclusive as to who was elected, and I cannot see with what object it should have been provided that the lists should be made out and deposited along with the voting papers for public inspection, unless it was to give an opportunity to the public to challenge his decision. If his decision can be reviewed at all, it must be by quo warranto. It is worth noticing that the Act now in force (38 & 39 Vict. c. 55, schedule 2, s. 51), provides that

(1) 2 E. & E. 86; 28 L. J. (Q.B.) 316. 5 Jur. N.S. 764

(2) Law Rep. 2 Q. B. 557.

(3) 2 Q. B. 740.

(4) 5 Q. B. 589.

the examination shall no longer be conducted in the absence of the candidates or their agents, but as the agents, though allowed to be present, are forbidden to interfere, it remains ex parte; and it seems to me that the presence of the agents can only be useful with a view to call the decision of the chairman in question.

If the local board of health had very unimportant functions to perform it would have been an intelligible policy to prevent litigation by making the decision of the chairman, even though likely to be a local partisan, final, though I think the legislature would have used clearer language if such had been their intention. But the functions of the local board are by no means insignificant. It seems to me that the true construction of s. 27 is that powers and duties are imposed on the chairman so as to increase the probabilities that his decision, which puts the member whom he declares elected into possession, shall be right; but that there is an absence of language to express that his decision shall be final, and I think it not likely to have been intended that it should be so.

I think, therefore, that evidence of all three classes of mistake was properly received, and that the rule should be discharged.

The following judgment, in which FIELD, J., concurred, was delivered by

MELLOR, J. This case was tried before my Brother Blackburn, sitting by consent, without a jury, and it is upon the facts as found by him that the judgment depends. The case was argued before him, my Brother Field, and myself.

The facts are sufficiently stated in the judgment of my Brother Blackburn, and it is not necessary to repeat them.

I cannot concur with him in the conclusion at which he has arrived, and I think that all the authority upon the subject which is to be found is adverse to the view which he has expressed. That some of the functions of the returning officer are judicial must, I think, be admitted, and certainly the expressions attributed to my Brother Blackburn in *Reg.* v. *Lofthouse* (1), and more expressly to myself (2), are strong to that effect, and, again, in *Reg.* v. *Backhouse* (3); and the same view was expressed by me,

(1) Law Rep. 1 Q. B. 439. (2) Law Rep. 1 Q. B. at p. 441.
(3) Law Rep. 2 Q. B. 17.

1876

THE QUEEN v. COLLINS.

not only of the law, but as to what had been actually decided in *Reg.* v. *Lofthouse.* (1)

Again, we have an authority of Lord Campbell, C.J., in *Reg.* v. *Cross* (2), as to the effect of this s. 27, when he stated that its operation is to make the certificate of the returning officer conclusive. It is true that this was an opinion expressed at nisi prius, and not so deliberately given as it would have been after argument in banc, but it is not the less an authority in favour of the view which I entertain of the effect of the 27th section. It is to be observed that the decision was given after much discussion and at the end of the evidence, and I cannot doubt that it was a deliberate expression of Lord Campbell's opinion as to the true construction of the section. It determined the case, and I am not aware that it was ever questioned, although leave to do so was expressly reserved. It is true that the section does not contain such complete machinery as might have been provided, still it may be asked, if the functions intended to be cast upon the returning officer were merely ministerial, why should language so inappropriate be used? He is required "to ascertain the *validity* of the votes by an examination of the rate books, and such other books and documents as he may think necessary, and by examining such persons as *he* may see fit." Again, with regard to the duties to be performed by him, he is "to cast up such of the votes as he shall find to be *valid*," and then, in the result, it enacts that the candidates to the number to be elected who shall have obtained the greatest number of votes "shall be deemed to be elected, and shall be certified as such by the chairman under his hand." It is not easy to discover by what words judicial duties can be assigned to an individual if the above are insufficient, and that this was Lord Campbell's opinion is clear from the words attributed to him in *Reg.* v. *Cross* (3): "I am at a loss to see what words could have been employed better calculated to convey that intention."

The legislature appears to have assumed that all the machinery necessary for the distributing and collecting and receiving the voting papers had been provided by the statute, and that the

(1) Law Rep. 1 Q. B. 439. (2) 19 L. T. 35.

(3) 19 L. T. at p. 36.

performance of the duties imposed on the various persons employed in the carrying out the election would be sufficiently secured by the penalty imposed by s. 28, and I think that there is nothing inconsistent with the view I take of the nature of the functions of the returning officer in the fact that he is required to deliver a certificate, "together with the nomination and voting papers which he shall have received" to the local board of health, who are to deposit them in their office for six months for public inspection.

I think that the legislature intended to circumscribe the litigation likely to arise in the election of these temporary officers and to prevent the title of votes from being inquired into by the expensive proceedings in quo warranto, leaving only mistakes and errors in the mechanical acts required to be done by the chairman to be rectified, but not permitting inquiry into acts done by the chairman when acting judicially. It seems to have been the object of the legislature to limit litigation as far as possible in constituting these very numerous bodies called local boards of health.

I do not think that much assistance is to be derived from other cases in which different words are used, but that the case must entirely depend upon the express words used in s. 27.

I am, therefore, of opinion that the contention on the part of the relator was right, and that our judgment should be that the rule be made absolute.

Rule absolute.

Solicitor for relator: *McArthur.*

Solicitors for defendant: *Combe & Wainwright.*

1876
March 18.

[IN THE COURT OF APPEAL.]

BRANDT *v.* LAWRENCE.

Contract for Sale of Goods to be delivered within limited Time—Partial Delivery by Vendor—Right of Purchaser to reject—Shipment to be made "by Steamer or Steamers."

4 CPD 241
244-5-6
248 250-1
258

The defendant entered into two contracts, each of which was for the purchase from the plaintiff of 4500 qrs. of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation." The plaintiff shipped on board one steamer 4511 qrs. to answer the first contract, and 1139 qrs. to answer in part the second contract. The plaintiff also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—

Held, that the defendant was bound to accept the 1139 qrs. in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late.

THIS was an appeal from the refusal by the Queen's Bench Division of a motion made by the defendant, under Order XL., Rule 4, of the Rules of the Supreme Court, for a rule to reduce the damages, and also for a new trial on the ground that the verdict was against the weight of the evidence.

The action was to recover damages, by reason of the defendant having refused to accept certain oats which were tendered to him by the plaintiff, under two contracts, dated respectively the 6th and the 11th of January, 1875.

The plaintiff was a merchant in London. The defendant carried on business at Ware.

The declaration set out the first contract which was contained in a bought note, which was (so far as is material) in the following terms:—"Ware, 6th January, 1875. Bought of Mr. Richard Brandt, London, 4500 qrs. (10 % more or less) of Russian oats of good merchantable quality, and similar to those shipped per *Astarte*, at 24*s.* 9*d.* per delivered 304 lbs., including freight and insurance to London. Shipment by steamer or steamers during February next, old style. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation at Revel."

The second contract, of the 11th of January, 1875, was for the purchase by the defendant of 4500 qrs. of oats at the price of 25*s.* per 304 lbs., and it was contained in a bought note, expressed in similar terms to the first.

The declaration then alleged that the plaintiff was ready and willing to do all things, and that all conditions were performed to entitle him to have the first contract performed by the defendant; yet the defendant would not accept and pay for the goods, or any part thereof, according to the terms of the agreement. There were similar allegations with respect to the second contract.

The defendant pleaded (inter alia) as to the first contract, that the goods were not shipped during the month of February, old style, then next, nor were the shipments of the same respectively made immediately after the opening of the navigation at Revel; that the plaintiff was not ready and willing to deliver to the defendant 4500 qrs. (10 per cent. more or less) of Russian oats, as contracted in the first contract; and similar pleas as to the second contract. The plaintiff joined issue.

The action was tried before Lord Coleridge, C.J. It appeared that the plaintiff entered into the contracts as alleged in the declaration, and he shipped at Revel, in a steamer called the *Winstead*, 5650 qrs. of oats, and tendered them to the defendant, as to 4511 qrs. in fulfilment of the first contract; and as to 1139 qrs. in part fulfilment of the second contract. The defendant refused to accept them, on the ground that the shipment had not been made immediately after the opening of the navigation. The plaintiff afterwards shipped, in another steamer called the *Oxford*, a sufficient quantity of oats to satisfy the balance due on the second contract, and tendered them to the defendant for that purpose. The defendant refused to accept these oats, on the same ground as the first. Upon the evidence, the jury found that the shipment by the *Winstead* was made in time, but that that by the *Oxford* was too late. Upon these findings the judge ordered judgment to be entered for the plaintiff for 189*l.*, that sum being the difference between the price at which the plaintiff had sold the 5650 qrs. shipped by the *Winstead* and the contract price.

On the 26th of February, the defendant moved ex parte, before

1876

BRANDT v. LAWRENCE.

Blackburn, J., and Quain, J., for a rule nisi to reduce the damages and for a new trial. The application was refused, and the defendant appealed ex parte.

H. Tindal Atkinson (*Cohen, Q.C.*, and *Morgan Howard, Q.C.*, with him), for the defendant. Upon the evidence it appears that the shipments were not made "immediately" after the re-opening of the navigation. On this ground there should be a rule. And, as to the reduction of damages, the contention is this. The second contract is an entire contract for the delivery of 4500 qrs. of oats within a specified time. It cannot be split into parts. If the whole was not shipped in time, the defendant was entitled to reject that part which was in time. The Queen's Bench Division thought that this was not so, because the contract says, "shipment by steamer or steamers," but those words make no difference.

[MELLISH, L.J. I think the legal inference is, that it was intended that the shipment should be made in different parcels, and that the purchaser was bound to accept them as they came if they were in time. He was not entitled to wait in order to see whether the whole was in time. Suppose one of the ships had been lost at sea, it could not surely be contended that the purchaser would have been entitled to reject the whole on that ground?]

When part only arrived in time the defendant was entitled to reject it, though of course he would do so at his peril, inasmuch as the remainder might arrive in time. In *Oxendale* v. *Wetherell* (1), Parke, B., said, "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered."

[MELLISH, L.J., referred to *Simpson* v. *Crippin*. (2)]

That was the case of a contract to deliver goods by periodical instalments; not a contract for the delivery of one entire

(1) 9 B. & C. 386. (2) Law Rep. 8 Q. B. 14.

to the quantity as here. Suppose fifty qrs. had been tendered defendant in time, and no more, would he have been bound to accept them?

[MELLISH, L.J. That would not have been a reasonable quantity.]

MELLISH, L.J. I am of opinion that there should be no rule. A mercantile jury have found that under all the circumstances the shipment by the *Winstead* was made in time, and I see no reason for objecting to their finding. I should, indeed, have been disposed to object to it if it had been the other way. The other question is, whether the damages ought to be reduced. The *Winstead* brought the whole of the oats included in the first contract, and also part of those which were comprised in the second contract. The remainder under that contract came in the *Oxford*, and that ship, as the jury have found, was not in time. Was the purchaser bound to accept that part of the goods comprised in the second contract which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made "by steamer or steamers." A considerable quantity of oats applicable to the second contract was shipped by the *Winstead*, which was in time, and I am of opinion that the defendant was bound to accept that part. I think that there should be no rule on this ground. The appeal will be dismissed with costs.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Appeal dismissed.

Solicitor for defendant: *A. Beddall.*

1876
Feb. 15.

LINDSAY and Others *v.* CUNDY and Another.

Contract induced by Fraud—Passing of Property—Conviction of Fraudulent Party, Effect of, under 24 & 25 *Vict. c.* 96, *s.* 100—*On Conviction "the Property shall be restored."*

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property, by false pretences, "shall be indicted on behalf of the owner of the property, and convicted, in such case the property shall be restored to the owner."

By s. 1 the term "property" shall include "not only such property as shall have been originally in the possession or under the control of any party, but also any property into which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

A. Blenkarn took premises at 37, Wood Street, London, and wrote to the plaintiffs at Belfast ordering goods of them. The letters were dated 37, Wood Street, and signed A. Blenkarn & Co., but in such a way as to look like A. Blenkiron & Co., of which name there was a long-established firm at 123, Wood Street. One of the plaintiffs had known something of this firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing the letters and goods to "A. Blenkiron & Co., 37, Wood Street." The fraud having been discovered, Blenkarn was indicted and convicted of obtaining the goods by false pretences. Before the conviction, the defendants had bonâ fide purchased the goods of Blenkarn, and resold them to other persons. The laintiffs having brought an action for the conversion of the goods:—

Held, first, that, as the plaintiffs intended to deal with the person at 37, Wood Street (although they thought him other than he was), and sent the goods to him, the property in the goods passed, subject to be divested while in Blenkarn's hands, or in the hands of a purchaser with notice of the fraud; and that the defendants therefore, having purchased bonâ fide, acquired a good title.

Secondly, that the title acquired under the statute by the owner of the property dated from the conviction, and had no relation back to the original fraud; and that, the defendants having parted with the goods when they had a good title, the plaintiffs could recover neither the goods nor the proceeds.

Held, also, by Blackburn and Mellor, JJ., that the definition of "property" in s. 1 did not apply to the word "property" in s. 100.

Hardman v. *Booth* (1 H. & C. 803; 32 L. J. (Ex.) 105) distinguished.

Merwood v. *Smith* (2 T. R. 750) followed.

Nickling v. *Heaps* (21 L. T. (N.S.) (Ex.) 754) dissented from.

DECLARATION for the conversion by the defendants of 250 dozen handkerchiefs of the plaintiffs.

Pleas, not guilty, and denial of plaintiff's property.

Issue joined.

At the trial, before Blackburn, J., at the Michaelmas sittings in

Middlesex, it appeared that one Alfred Blenkarn, with the intent to commit frauds, hired a third floor in some premises, No. 37, Wood Street, and 5, Little Love Lane, Cheapside, there being a well-known and respectable firm of the name of William Blenkiron & Sons at No. 123, Wood Street. Blenkarn wrote orders, at the end of 1873, to the plaintiffs, who are linen manufacturers at Belfast, for a large quantity of linen cambric handkerchiefs, his letters having a printed heading, "37, Wood Street, Cheapside, London," "Entrance, second door in Little Love Lane," and he signed "A. Blenkarn & Co." in such a way as to look like "A. Blenkiron & Co." One of the plaintiffs had known the firm of Blenkiron several years before, and knew they were respectable. And the plaintiffs wrote several letters addressed to Messrs. Blenkiron & Co., 37, Wood Street, and they forwarded several lots of handkerchiefs to the same address; heading the invoices "Messrs. Blenkiron & Co., London, bought of Roberts, Lindsay, & Co." The fraud was afterwards discovered, and Blenkarn was indicted and convicted in April, 1874, of having obtained the handkerchiefs by the false pretence that he was Blenkiron & Sons. In the meantime the defendants had bought of Blenkarn 250 dozen cambric handkerchiefs, and had resold them all to different persons before the fraud of Blenkarn was discovered.

The jury, in answer to questions by the learned judge, found, in effect, that the defendants had bonâ fide purchased the handkerchiefs of Blenkarn, and that they were part of the handkerchiefs sold by the plaintiffs.

The learned judge reserved the question for the Court, whether on the facts and findings the action was maintainable; and refused to enter judgment for either party.

Notices of motion to enter judgment having been given by the plaintiffs and defendants respectively.

Edwards, Q.C., and *Besley* (with them *Thesiger, Q.C.*), in support of the motion to enter judgment for the plaintiff. No property passed from the plaintiffs, inasmuch as they intended to contract with Blenkiron & Co. and not with Blenkarn, so that there was no contract of sale at all: *Hardman* v. *Booth*. (1)

(1) 1 H. & C. 803; 32 L. J. (Ex.) 105.

1876

LINDSAY v. CUNDY.

[BLACKBURN, J. No doubt that case is good law, and was affirmed in *Hollins* v. *Fowler* (1); but the question is, whether we should draw the same inference from the evidence as the Court of Exchequer did. Blenkiron & Co. are at 123, Wood Street; the plaintiffs addressed their letters and sent the goods to the person, be he Blenkarn or Blenkiron, 37, Wood Street.]

Yes; but under an entire mistake as to the person to whom they were selling. In Benjamin on Sale, p. 48, it is said: "Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale, and even delivery of the goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him:" citing *Hardman* v. *Booth* (2), and *Higgons* v. *Burton* (3); and then the author adds: "The contracts in the cases cited below were held void, on the ground of fraud, but they were equally void for mistake, or the absence of the assent necessary to bring them into existence." See also *Boulton* v. *Jones*. (4) Secondly, by s. 100 of 24 & 25 Vict. c. 96 (5), the

(1) Law Rep. 7 Q. B. 616; Law Rep. 7 H. L. 757.

(2) 1 H. & C. 803; 32 L. J. (Ex.) 105.

(3) 26 L. J. (Ex.) 342.

(4) 2 H. & N. 564; 27 L. J. (Ex.) 117.

(5) 7 & 8 Geo. 4, c. 29, is repealed by 24 & 25 Vict. c. 95, s. 1 and sch.; and s. 57 is re-enacted in nearly the same terms by 24 & 25 Vict. c. 96, s. 100: "If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: . . ."

By s. 1: "The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

property obtained by false pretences is to be restored to the owner on conviction of the guilty party; that is, on the conviction, the property revests in the owner: *Scattergood* v. *Sylvester*. (1) That case was decided under 7 & 8 Geo. 4, c. 29, s. 57, but the terms of that section are almost identical with those of s. 100 of the present Act. The Court of Exchequer, in *Nickling* v. *Heaps* (2), have expressly decided that where goods have been obtained by false pretences, on conviction there is a relation back to the time of the original fraud. Kelly, C.B., said: "Having regard to the authorities and to the statute, I am clearly of opinion, that upon the conviction of Ford for obtaining these goods by false pretences, there was a relation back to the time of the original fraud committed on the defendants, namely, the time at which Ford obtained these goods from them. These goods, therefore, were the property of the defendants from the first, and the property was in law never out of them." And Martin, B.: "What the defendants did was really in fact no more than to take their own goods. The case may be argued for ever, but that is what it comes to after all. On a more mature consideration of the section of the Act of Parliament, and the case of *Scattergood* v. *Sylvester* (1), the effect and operation of the statute, in my judgment (though I was at first inclined to take a different view of it), is, that the property in these goods was never out of the defendants at all, and that, therefore, they only in fact possessed themselves of their own property."

[*Sir H. S. Giffard, S.G.*, for the defendants, referred to *Horwood* v. *Smith* (3), as deciding the direct contrary.]

That case was decided under the old statute, 21 Hen. 8, c. 11, which is in different terms from the modern statutes. (4) *Parker*

(1) 15 Q. B. 506; 19 L. J. (Q.B.) 447.

(2) 21 L. T. (N.S.) 754.

(3) 2 T. R. 750.

(4) 21 Hen. 8, c. 11: "If any felon hereafter do rob, or take away any money, goods, or chattels from any of the king's subjects, from their person or otherwise, and the said felon be indicted and after arraigned of the same felony and found guilty thereof, . . . the party so robbed, or owner, shall be restored to his said money, goods, and chattels," and the justices before whom the felon is found guilty are empowered to award "writs of restitution for the said money, goods and chattels, in like manner as though any such felon were attainted at the suit of the party in appeal."

1876

LINDSAY v. CUNDY.

v. *Patrick* (1) will be relied on by the other side, but that case was before 7 & 8 Geo. 4, c. 29, which extends to false pretences as well as felony; and, moreover, in *Peer* v. *Humphrey* (2) that case was doubted; and it was held that even if the defendant, a bonâ fide purchaser, has parted with the goods before conviction, the owner may recover the value in trover.

[BLACKBURN, J. That was a case of felony.]

The statute (24 & 25 Vict. c. 96) by s. 1 says that property shall include anything into which the property has been converted, that is, the proceeds; so that independently of the doctrine of relation, the defendants here are in possession of the proceeds of these handkerchiefs, and the plaintiffs therefore have a right to have that "property" restored to them.

Sir H. S. Giffard, S.G. (with him *B. Francis Williams*), for the defendants.

[BLACKBURN, J. We are agreed that the property passed from the plaintiffs, as they intended to sell to the people at 37, Wood Street, and sent the goods there.]

The distinction between larceny and false pretences must be borne in mind. In the case of larceny neither the right of possession nor property passes from the owner. But in the case of obtaining goods by false pretences the property passes until the transaction be avoided by demand of the goods or otherwise. In *Horwood* v. *Smith* (3) the goods were feloniously taken, but there had been a sale in market overt to the defendant, so that the property passed to him, just as in the present case; and the Court held that as the defendant had parted with the goods—although after notice of the felony—before the conviction, the plaintiff could not recover in trover. That is precisely in point with the present case, for the language of 24 & 25 Vict. c. 96, s. 100, is not materially different from that of 21 Hen. 8, c. 11; whether a man be restored to his property or his property be restored to a man would seem to amount to the same thing. It is true that in *Scattergood* v. *Sylvester* (4) it was said by the Court, "the property should be restored to the owner" meant the right of the owner should be

(1) 5 T. R. 175.
(2) 2 A. & E. 495, 499.
(3) 2 T. R. 750.
(4) 15 Q. B. 506; 19 L. J. (Q.B.) 447.

revested; the point however decided was only that the owner could recover in trover under the statute without a writ of restitution; the stolen cow was still in the defendant's possession after the conviction, and Patteson, J., says expressly, "I think the statute revests the property on conviction; and any one who *afterwards* converts the chattel may be sued by the owner." So that the only case in which it is said that there is any relation back is *Nickling* v. *Heaps*. (1) That case is very difficult to understand; as the conviction there was after the trial, the Court must have proceeded on some equitable view of the facts; and they did not enter the verdict for the defendant, but only granted a new trial unless the plaintiff consented to a verdict for nominal damages with costs. The proper construction of the statute, therefore, is, that it enables the owner to recover the goods or proceeds against any one who has had the goods in his possession after the conviction; but not against a person who, like the defendants, had a perfectly good title, before the conviction, when they sold the goods. [He also referred to *White* v. *Spettigue*. (2)]

Besley was heard in reply.

BLACKBURN, J. I think that the judgment should be entered for the defendants. The first question that arises is one of fact, were these goods, which were originally the property of the plaintiffs, Messrs. Lindsay & Co., obtained from them by fraud, so that the property passed from them under a contract, though a contract liable under certain circumstances to be avoided; or did the property never pass from the plaintiffs at all? Upon that question reliance was placed on the case of *Hardman* v. *Booth* (3), and that case unquestionably lays down very good law. The question for us is whether the facts are the same, and whether we ought to draw the same inference from the facts that the Court of Exchequer did in *Hardman* v. *Booth*. (3) That case lays down this law, that where a person has sold goods to A. B., or has been led to believe he has sold them to A. B., and delivered them as he supposes to A. B., and the person who led him into that belief receives and carries off the goods, and disposes of them to another—there

(1) 21 L. T. (N.S.) 754.
(2) 13 M. & W. 603.
(3) 1 H. & C. 803; 32 L. J. (Ex.) 105.

1876

LINDSAY v. CUNDY.

has not been a selling to the person who fraudulently represented himself to be a servant or agent of the supposed purchaser, A. B., and he cannot confer a good title upon any one else, the property never having vested in him. The facts in *Hardman* v. *Booth* (1) seem to have been these: The plaintiffs, meaning to deal with Thomas Gandell & Sons, went to their office and took an order from a person who, as they believed, and in point of fact was, the son of Thomas Gandell, and whom they believed to be acting for the firm of Thomas Gandell & Sons; and they took away a card of the firm of Thomas Gandell & Sons, to shew to whom they were to send them, and they sent them to Thomas Gandell & Sons' place of business. Edward Gandell, who was the son of Thomas Gandell, had a private business of his own, and he it was who in that office had given the order for Thomas Gandell & Sons without any authority, and he it was, as it was proved upon the trial, who intercepted the goods when they arrived at Messrs. Gandell's, and carried them away, and sold them to the defendant. Upon these facts, the Court of Exchequer drew the inference that there never was any property vested in Edward Gandell as purchaser under a contract voidable through fraud; for there never was intended to be a contract with anybody but Thomas Gandell & Sons, and in point of fact that contract did not exist, because Thomas Gandell & Sons had not meddled in the matter in any way; and what had been done by the plaintiffs did not in the slightest degree constitute a contract with Edward Gandell vesting the property in him. I think that is good law, and the inference would seem upon the evidence to have been correctly drawn.

The same law was applied in the case of *Hollins* v. *Fowler* (2), which was subsequently affirmed in the House of Lords, the facts there being clear.

When we look at the facts of the present case they are not the same at all. The plaintiffs having received a letter from a person who signed himself with the name of "Blenkarn," looking like "Blenkiron," & Co., of 37, Wood Street, they address all their letters to him, and send the goods to him at 37, Wood Street, and deliver them there, and everything is done with him at 37, Wood

(1) 1 H. & C. 803; 32 L. J. (Ex.) 105.

(2) Law Rep. 7 Q. B. 616; Law Rep. 7 H. L. 757.

1876

LINDSAY v. CUNDY.

Street. The fact was, that there was a highly respectable firm of the name of William Blenkiron & Co., at 123, Wood Street, and this man had set up a pretended business at 37, Wood Street, in the hope that people would confuse him with his namesake, and he would get the advantage of his namesake's character. In this particular case he did get the advantage of his namesake's character, and it being found that he did so intentionally, and that it was a fraudulent intention, he was guilty of obtaining the goods under false pretences; but none the less was the contract by the plaintiffs made with him. It was made with him exactly upon the same reasoning as led to the decision in the criminal case before Crompton, J. (1), where the criminal having an ill-will against A., and thinking that the next sentry was A., when in fact it was B., shot at him, having in his mind the intention to kill A.; the man lived, and under the statute it was necessary to indict the prisoner for shooting at with intent to murder a particular person, and the indictment was laid that he shot at B., with intent to murder B.; and Crompton, J., held, that if the jury thought the prisoner intended to kill the man he shot at, who in fact was B., though the prisoner believed he was shooting at A., they would nevertheless find him guilty. The prisoner was found guilty, and sentence of death was recorded; and the conviction was upheld without any doubt. So here, upon the facts of this case, the intention of the plaintiffs was to contract with the person who was carrying on business at 37, Wood Street, and there was therefore a contract with him, although it was obtained by fraud.

Now, to come to the other part of the case. The rule of law has been thoroughly established—the cases are numerous, and I need not cite them—that where a contract is voidable on the ground of fraud, you may avoid it, so long as the goods remain in the man's hands who is guilty of the fraud, or in the hands of anybody who takes them from him with notice; but where a person has bonâ fide acquired an interest in the goods, you cannot, as against that person, avoid the contract. Where the goods have come into the hands of a bonâ fide purchaser you cannot take them back. The case is very closely analogous to the old common-law rule, in the case of felony or trespass. If goods are stolen or

(1) *Reg.* v. *Smith* (Dears. J. P. Cr. C. 559; 25 L. J. (M.C.) 29).

1876

LINDSAY v. CUNDY.

taken away by trespass, no title whatever is conferred, in general, upon a purchaser from the person who took them, however bonâ fide the purchase may have been; but if the sale be in market overt to a person who has no knowledge of the felony or trespass, then the purchaser acquires the property, notwithstanding the goods had been taken from the owner by felony or trespass.

Let us now see how the statutes stand. The first was the statute 21 Hen. 8, c. 11, which said that when the felon had been convicted, the owner should be "restored to his goods." Under that statute came the decision in 1788, in the case of *Horwood* v. *Smith* (1), where the facts were, that the defendant, a bonâ fide purchaser of sheep in market overt, hearing there was a prosecution for felony going on against the person of whom he purchased them, and having distinct notice of it, nevertheless sold the sheep; and the question was whether, after the subsequent conviction of the felon, the defendant having previously parted with the property, the original owner of the sheep could sue him in trover; and the Court held he could not. Lord Kenyon, C.J., says: "There is no doubt but that the original owner of these goods, who prosecuted the felon to conviction, has a right to a restitution of them. But the question here is, whether he can maintain this action of trover against the defendant, who was not in possession of them at the time of the attainder; and we are of opinion that he cannot. To maintain this action, the defendant should have been in possession at the time of the attainder. But if the plaintiff could maintain this action, he may recover with equal propriety against any one of the various persons through whose hands the goods may have passed in the intermediate time." What Lord Kenyon seems to consider as an absurdity, is the very thing the plaintiffs seek to do here. Buller, J., says: "This is an action of trover for sheep; and in order to maintain it the plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. Now when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property had been altered by a sale in market overt. From the time of the conviction the defendant has never had pos-

(1) 2 T. R. 750, 755.

session of the sheep." Altering the words very slightly, they would apply to the present case. When did the plaintiffs' property begin, that is to say, begin after the time the defendants had got the goods, in this case? Not till after the conviction of the person guilty of the fraud, because before that time the property had been altered by a bonâ fide purchase from a person who held them under a voidable but not void contract. Altering these few words, everything in the judgment of Buller, J., is applicable to the present case.

The statute of 7 & 8 Geo. 4, c. 29, s. 57, used the same word "restored," applying the restoration not only to cases of felony, but also to cases of misdemeanor; and the present statute, 24 & 25 Vict. c. 96, s. 100, is in almost the same words as the statute of Geo. 4. And certainly, looking to the plain meaning of the words, "if the guilty person shall be convicted the property shall be restored," one would say it means, the property shall be restored from that time, not that it shall be considered to have been restored. The case of *Horwood* v. *Smith* (1) shews decidedly that the latter is not the meaning. And in the case of *Scattergood* v. *Sylvester* (2), though that was not the point before the Court, the Court used language which shews very strongly they had in their minds that the right to the stolen property was only from the conviction, and that then it was a fresh title that was given. The case relied upon, and properly relied upon, to the contrary is *Nickling* v. *Heaps* (3), which to my mind certainly is not very intelligible. According to the facts stated, it was a clear case of the defendant having parted with his goods to Ford under such circumstances that Ford had a voidable contract, and had conferred upon Nickling, who, as the facts are stated, was a bonâ fide purchaser, a title that was good, and the defendant committed a conversion by taking away these goods from him. Subsequently to the conversion Ford was convicted of false pretences, and somehow or other the Court of Exchequer seem to have thought (I cannot make out upon these facts how) that that fact prevented there being a conversion before. If it had been a case of larceny, and not false pretences, I could have understood it. Mr. Baron Martin,

(1) 2 T. R. 750. (2) 15 Q. B. 506; 19 L. J. (Q.B.) 447.
(3) 21 L. T. (N.S.) 754.

1876

LINDSAY v. CUNDY.

however, certainly is reported to have said that the defendant had only taken away his own goods, which is not the case if the facts are correctly stated. He implies that the word "restored," in his opinion, must mean replaced ab initio, from the time the fraud was committed. I can only say that it seems to me that the words of the statute do not bear that meaning. The case I have just cited of *Horwood* v. *Smith* (1) is a strong authority for shewing that the similar words in the statute of Hen. 8 do not bear that meaning. However unwilling I may be to differ from the judgment in the Court of Exchequer, I cannot think the point was so decided as to be binding upon us; for I may observe that after all it resulted in a verdict for the plaintiffs for 40*s*. I do not think we can be bound by that decision, and I greatly prefer to act upon the authority of the case of *Horwood* v. *Smith* (1), and to say that "restored" means restored from the time of conviction.

There remains one other point only to be considered. The statute 24 & 25 Vict. c. 96, repeats in s. 100, the words of the former statute of Geo. 4. In the event of conviction "the property shall be restored to the owner;" but in the interpretation clause (s. 1) (which is a modern innovation and frequently does a great deal of harm, because it gives a non-natural sense to words which are afterwards used in a natural sense, without noticing the distinction), it is said: "The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover, or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." I think that was probably meant to point to a class of cases dealt with in the Act subsequently, such as where a servant obtains a 5*l*. note, and changes the 5*l*. note to five sovereigns, and afterwards converts the sovereigns, if he would have committed a larceny as a servant, by stealing the 5*l*. note, he will have committed a larceny of the five sovereigns. That is

(1) 2 T. R. 750.

the class of case to which I think the interpretation clause may be meant to apply. The words of s. 100 are, "Upon conviction the property shall be restored"; and it was argued that Blenkarn was here convicted of obtaining by false pretences this property, and therefore the property shall be restored, meaning thereby not only the property which had been in the possession or under the control of the defendants, but also the money into which they had converted it by selling it. I cannot think that to decide in favour of this argument would be holding what was intended at all. It would, clearly, be making a very great change in the law; and Lord Kenyon in the case of *Horwood* v. *Smith* (1), seems to treat such a thing as an absurdity. Here, it is supposed to be introduced into the law by means of the interpretation clause, which, I have already pointed out, to my mind, was intended to apply to quite a different set of cases, and has no bearing upon the restitution of property in s. 100.

That disposes of the whole of the points in the case. No doubt the plaintiffs parted with their goods through false pretences, but I do not think the defendants are under an obligation to pay for them, and, consequently, judgment should be entered for the defendants.

MELLOR, J. I am of the same opinion. I confess for some little time I was embarrassed by the interpretation clause (s. 1), and was rather disposed to think it might be read and introduced into s. 100; but for the reasons which have been assigned by my Brother Blackburn, I think that the interpretation clause was introduced with another object, and is satisfied by other sections in the Act to which he has referred; and I certainly think it would be inconsistent to introduce it in the sense in which it is sought to be introduced in s. 100.

I could not help thinking that the case of *Nickling* v. *Heaps* (2) in the Court of Exchequer, must have proceeded upon some misapprehension as to the distinction between goods obtained by misdemeanor, false pretences, or otherwise, and the case of felony; and without considering this distinction, and the point decided in

(1) 2 T. R. at p. 755. (2) 21 L. T. (N.S.) 754.

1876

LINDSAY v. CUNDY.

Scattergood v. *Sylvester* (1), the Court seems rather hastily to have come to the conclusion that that case was an authority for the decision which they pronounced. I am bound to say that though at first I thought they had lost sight of the distinction between misdemeanor and felony, yet the Lord Chief Baron does undoubtedly refer expressly to these goods as having been obtained by false pretences; and then says there was a relation back upon conviction to the original fraud. And Mr. Baron Martin decides that the plaintiff's property in the goods had really not been affected by anything that had been done. I think, however, that that case cannot be considered as a binding authority; and therefore, with great respect for those two learned judges who decided it, I think it does not govern us, and we ought not to consider ourselves bound by it in the present case.

With reference to the other points in the case, I quite agree with what has been said by my Brother Blackburn as to the distinction between this case and the case of *Hardman* v. *Booth* (2), which must be considered a thoroughly established case in law. It is very clear that there the plaintiffs never intended to contract with Edward Gandell; but here the plaintiffs did intend to contract with this individual who had his premises at 37, Wood Street, and the goods were sent there. They undoubtedly negligently allowed themselves to be led to suppose he was a person other than he was; but the contract was with him, and it was their intention to contract with that individual. I quite agree in thinking, from the other circumstances of the case, that if they had got back or claimed the goods at any time before they were disposed of to a bonâ fide purchaser, the matter would have been different; but I think that as soon as the goods were disposed of to a bonâ fide purchaser for value the right of the plaintiffs to get them back altogether ceased.

I think, therefore, the defendants are free from liability in respect of the goods which they bonâ fide purchased from Blenkarn and disposed of before his conviction.

LUSH, J. I am of the same opinion. If these goods had been

(1) 15 Q. B. 506. (2) 1 H. & C. 803; 32 L. J. (Ex.) 105.

stolen from the plaintiffs by Blenkarn, then the defendants might have been liable; but they were not stolen, they were, in my opinion, for the reasons given by my Brother Blackburn, obtained by Blenkarn under such circumstances that the property vested in him. They were bought by him of the plaintiffs under the false pretence that he was another person, but then he was the person with whom the plaintiffs dealt, to him the goods were sold, and to him the goods were delivered; and the property therefore passed in those goods to him, subject to the plaintiffs' right to reclaim the property, so long as the goods remained in his possession, upon finding out the fraud, or until they had prosecuted him to conviction. But except in one or other of those two events the plaintiffs' title to the goods is gone. They did not reclaim the goods until after he had sold them, so that the goods passed into the hands of the defendants as bonâ fide purchasers. They were Blenkarn's property, and the money he received for them became his money. After that, the plaintiffs prosecuted the man to conviction; and then arises the question under s. 100 of 24 & 25 Vict. c. 96, what are the rights of the plaintiffs arising out of that conviction.

It appears to me this case is precisely analogous to the case of *Horwood* v. *Smith* (1) decided many years ago. The difference between that case and the present is that there the goods had been stolen, but then they had been sold in market overt which passed the property, and the defendant in that case bought them in market overt, and therefore he acquired a good title; just as the defendants here acquired a good title by the bonâ fide purchase from the fraudulent buyer. The defendant in that case sold the goods again, and after that the thief was convicted. Then arose the question, whether the original owner of the goods could claim them against the defendant who had bought the goods in market overt and sold them before conviction, and the Court held he could not. That is exactly this case. The defendants bought the goods of a person competent to give them a good title, they sold them before conviction; and therefore the money they received was their money, and there is nothing in s. 100 which entitles the

(1) 2 T. R. 750.

1876

LINDSAY v. CUNDY.

plaintiffs to take the money out of the defendants' pocket. The plaintiffs may, upon conviction, acquire a fresh title to the goods, but then they must get the goods from the person in whose hands they can find them, or what may be the substitute for the goods.

Judgment for the defendants.

Solicitors for plaintiffs: *Ashurst, Morris, & Co.*
Solicitor for defendants: *C. O. Humphreys.*

April 10.

SUGG *v.* SILBER.

Judicature Act, 1873, *ss.* 56, 57—*Order XXXVI., Rules* 2, 3, 5, 6, 26—*Trial before Judge with Assessors—Right of Defendant to give Notice of Trial by Jury.*

Where the plaintiff gives notice of trial before a judge sitting with assessors, the defendant has a right under Order XXXVI., Rule 3, by giving notice within the time specified, to insist on a trial before a judge and jury; and the Judicature Acts and Rules of Court do not give power to the Court or a judge to deprive the defendant of this right.

ACTION for the infringement of letters patent in the construction of gas-burners and fittings. The plaintiff joined issue, and gave the ordinary notice of trial in June, 1875, before the Judicature Acts and Rules came into operation. On the 27th of January, 1876, on the plaintiff's application, Archibald, J., at chambers, after hearing counsel on both sides, and reading the plaintiff's affidavits, ordered that the action be tried and heard before a judge sitting with assessors, and that the notice of trial already given be varied, with liberty to either party to apply to him again. Within four days after this notice was made the defendant gave the plaintiff notice that he required to have the issues of fact tried before a judge and jury. The plaintiff, however, summoned the defendant to attend before the judge at chambers to appoint assessors. At the hearing of this summons on the 10th of March the defendant insisted on his right to try before a judge and jury, and Archibald, J., referred the question to the Court whether his order of the 27th of January was annulled by the defendant's notice requiring trial by jury.

1876

SUGG v. SILBER.

R. E. Webster, for the plaintiff, moved accordingly that the action be tried before a judge sitting with assessors. At chambers the learned judge was clearly of opinion that this was not a proper case for a jury, and the only question is, whether he had power under the Acts and Rules to compel the defendant against his will to try before assessors. Sect. 56 of the Judicature Act, 1873, says that the High Court, or Court of Appeal, may, in any cause "in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter, wholly or partially, with the assistance of such assessors." By s. 57, in any cause requiring any scientific investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted through its other ordinary officers, the Court or a judge may at any time, and without the consent of the parties, on such terms as may be thought proper, order any question or issue of fact to be tried, either before an official referee or before a special referee. These powers are compulsory, and manifest the intention of the legislature that in certain cases trial by jury should, even against the wish of both parties, be superseded by a fitter tribunal. Sect. 39 gives a judge at chambers all the powers of the Court. The Rules of Court are designed to carry out the Act, and must be construed with reference to it. Order XXXVI., Rule 2, enumerates various modes of trial; Rule 3 allows the plaintiff to give notice of any one of those modes; and the only enactment in the Acts or Rules which gives the defendant a right to control the plaintiff's choice is the latter part of Rule 3, which enables the defendant, within the time specified, to give notice that he wishes to have the issues of fact tried before a jury. All this refers to what the parties may do independently of the Court or a judge, but Rule 3 is expressed to be "subject to the provisions of the following rules." Therefore the option given to the defendant by Rule 3 is subject to the power given by Rules 5 and 6 to the Court or a judge to order issues in fact to be tried by different modes and at various times: and this power is apparently independent of the wish of the parties. At the time when Archibald, J., made the order for trial with assessors, neither party had given notice that he desired a

1876

SUGG v. SILBER.

trial before a jury, and the present case is therefore strictly within Rule 5.

Aston, Q.C., and *Macrory*, for the defendant. It must be admitted that this action would be best tried by a judge with assessors, but the defendant insists on his right to a jury. Sect. 57 of the Judicature Act, 1873, does not refer to assessors, and is beside the present question. The whole of s. 56 is controlled by its opening words, "Subject to any Rules of Court, and to such right as may now exist to have particular cases submitted to the verdict of a jury." Those words shew a clear intention to preserve the right to try before a jury. This right is expressly given by Order XXXVI., Rule 3; and Rule 6 is made "subject to the provisions of the preceding rules." Rule 5 does not apply to the present case. It is designed only for cases where neither party wishes to have a jury, and where one party seeks some mode of trial different from that specified by his opponent; here the plaintiff sought to alter his own notice. Order XXXVI., Rule 26, shews plainly that it was not intended to give the Court or a judge power to order a trial without a jury in any other cases than those which before the Judicature Act could, without consent of parties, be tried without a jury, of which the present is not one.

R. E. Webster, in reply. Order XXXVI., Rule 5, applies to "any case within the 57th section of the Act," which means not only any case in which an order has been made under s. 57, but any case in which an order might have been made under s. 57. The present is such a case.

COCKBURN, C.J. There may be some difficulty in determining whether the framers of the Judicature Acts and Rules intended to leave it to the discretion of a judge to take away from a defendant the right which he previously had of trying his case before a jury. I, for one, have no hesitation in saying I should be glad if there were such a power, in cases like the present, where the subject-matter of the action involves questions of science, which can be adequately dealt with only by assessors who have the requisite scientific knowledge. That power has not, so far as I can see, been given by the Judicature Acts. Clearly it has not

1876

SUGG v. SILBER.

been given by s. 56 of the Act of 1873. Sect. 56 does not give power to a judge at chambers directly, but, by the earlier part, gives power to the High Court, or the Court of Appeal, or a Divisional Court or judge before whom a cause is pending, to determine whether a trial at Nisi Prius shall be superseded altogether, and the question be referred to an official or special referee. This power is "subject to any Rules of Court and to such right as may now exist to have particular cases submitted to" a jury. The latter part of the section enables the High Court or the Court of Appeal to call in the aid of assessors. Order XXXVI., Rule 2, says, "Actions shall be tried and heard either before a judge or judges, or before a judge sitting with assessors, or before a judge and jury, or before an official or special referee, with or without assessors." Rule 3 gives the plaintiff a right of choice: he may, in his notice of trial, specify any one of the modes mentioned in Rule 2; but, whatever form of trial the plaintiff may specify, the defendant (by the latter part of Rule 3) may, within the specified time, supersede it and insist on a trial before a judge and jury. Rule 5 gives either party in certain cases power to apply to the Court or a judge for an order that the mode of trial be in some other form than that specified in the notice of trial. But the change from one mode to another which is provided by Rule 5 as within the capacity of either party to apply for, must be a change which it is in the power of the Court or a judge to order against the will of the other party; and I look in vain for any power given to the Court or a judge at chambers to direct in invitum that a trial before assessors shall prevail notwithstanding the fact that the defendant has, under Rule 3, given notice to supersede the form of trial which the plaintiff has specified in his notice. There is nothing to take away from the defendant the right given by Rule 3 to insist upon trial by jury. Whether this result was intended by the framers of the new legislation I do not know, but that is the view I take of the language employed.

QUAIN, J. I am of the same opinion. I take this to be in substance, though not in form, an appeal from my Brother Archibald's order. I think a judge has no power to make a peremptory order

1876

SUGG v. SILBER.

ousting the defendant from his right to give, within the time mentioned in Rule 3, notice of his desire to have the issues of fact tried before a jury. This order, therefore, was subject to the defendant's right to give that notice within the specified time. I do not read Rule 5 as Mr. Webster does. I think it is meant to apply where one party wishes to change the mode of trial specified, not in his own notice, but in that of the other party; and I think there is no power to direct a trial before a judge and assessors so as to deprive the defendant of the liberty to give the notice of trial before a jury mentioned in Rule 3.

POLLOCK, B. I am of the same opinion. The result of the rules is that, whatever desire a plaintiff may have to try before a judge and assessors, and however proper that mode of trial may be in the opinion of the judge, the defendant has an option to try before a judge and jury if he wishes to do so, and gives the notice within the time prescribed by Rule 3. This is tolerably clear when we look at the repealed rules which were incorporated in the schedule to the Judicature Act, 1873. The 30th of those repealed rules is identical with Order XXXVI., Rule 2, but the 31st of those repealed rules is different from Order XXXVI., Rule 3. The clause in the 31st of the repealed rules, which gives the Court or judge power to determine the mode of trial, is omitted in Order XXXVI., Rule 3. I think the intention was to reserve this right to a defendant. Whether it was wise to do so or not, is another question. For myself, I think it was unfortunate.

Order for trial before a judge and jury.

Solicitors for plaintiff: *Charles Rogers & Sons.*
Solicitors for defendant: *Johnson, Upton, & Budd.*

HINGSTON *v.* WENDT.

1876
Feb. 8.

Ship and Shipping—Right of Master and his Agent to detain Cargo for Expenses incurred with Respect to it exclusively—General Average—Authority of Agent authorized to receive Cargo—Salvage.

A vessel having gone ashore with a cargo on board, the plaintiff, a ship agent, was put in possession of the ship and cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, and brought it to a place of safety, where he took possession of it. The hull broke up, and became a wreck. The expenditure by the plaintiff was not for the purpose of enabling the shipowner to perform his contract and to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—

Held, that the plaintiff had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage.

Held, also, that an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, is impliedly authorized to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo.

CASE stated on appeal from the county court of Devonshire, holden at Kingsbridge.

This is an action wherein the plaintiff sought to recover 41*l.* 8*s.* 9*d.*, being the balance of the following particulars for work done and payments made in respect of the German brigantine *Theodor*, which went ashore at Hope Cove, between Dartmouth and Plymouth, on the 14th of February, 1874:—

1874. February.	£	*s.*	*d.*
To paid labourers discharging cargo, and allowance	35	12	0
Cartage	0	16	0
Labour about cotton seed one week, per your special order	0	18	0
Your proportion of account paid cottager for attendance, use of cottage, and refreshments during wreck	0	13	9
Cartage of cargo	1	7	0
do. do.	1	4	0
Proportion of posting charges, say . . .	3	3	0

1876

HINGSTON v. WENDT.

Proportion of telegrams and porterage thereof, and messengers	1	10	0
Labour about cargo to 28th February, by your order	0	18	0
Your proportion of personal expenses till we were able to deliver the cargo to you . . .	4	4	0
	£50	5	9
Commission on above advances	2	10	0
Our agency and trouble superintending discharge of cargo, and trouble on this business . .	10	10	0
	63	5	9
June. By cash of E. E. Wendt, Esq. . .	21	17	0
	£41	8	9

The plaintiff was a ship agent living at Dartmouth, Devon :—

The plaintiff was put into possession of the vessel and cargo by the master of the vessel *Theodor* almost immediately after she was stranded. Whilst in such possession the plaintiff rendered the services to the cargo, and paid by order of the master such moneys in respect thereof as is stated in the particulars, and the plaintiff placed the cargo in a warehouse in safety under lock and key.

The defendant afterwards, as the holder of the bill of lading of the cargo (1), claimed to be entitled thereto, and presented such bill of lading to the plaintiff, and demanded possession thereof by his agent, Captain Slight, R.N. Slight, by a verbal promise, expressly promised the plaintiff that he should be paid his costs and charges for the services so rendered to the cargo, whereupon the plaintiff delivered up possession of the cargo to Slight.

The charges of the plaintiff were fair and reasonable.

The stores were landed before the cargo, and the vessel, after discharge, was sold for 95*l.* or 100*l.*, and she broke up where she lay.

It was proved, on behalf of the defendant, that Slight had no

(1) It was not stated in the case, but it appeared from correspondence, which it is unnecessary to set out, that the defendant held the bill of lading on behalf of Mr. Wendt of London, the owner of the cargo.

general authority from him to undertake for the payment of expenses, and that he had no special authority to do so in this case.

10. It was contended that the plaintiff had a lien on the cargo for the said costs and payments, and that the defendant was bound by the verbal promise of Slight for the payment thereof.

11. It was contended for the defendant that the plaintiff had no lien upon the cargo for the expenses of discharging the same, and that the work was done and money paid by the plaintiff without any request or authority from the defendant, and that the plaintiff's charges were payable by the master or owner of the vessel.

12. The learned judge gave a verdict for the plaintiff for the full amount claimed, 41*l.* 8*s.*, holding that there was an expressed as well as an implied promise that the expenses should be paid.

The question for the opinion of the Court is, whether the learned judge was right in deciding for the plaintiff.

Jan. 18. *Phillimore*, for the defendant. The decision of the county court judge was wrong. It is quite clear that Slight had no authority from the defendant to incur the expenses in question. Before he could pledge the defendant's credit he ought to have communicated with him: *The Karnak.* (1) There is no pretence for saying that what was done by the plaintiff gave him a right to claim as for salvage. To support a claim for salvage there must have been extraordinary danger to the property, and nothing of the kind was shewn here.

Bullen, for the ~~defendant~~. The plaintiff had a claim as for salvage: Park on Marine Insurance, 8th ed. vol. i. p. 300.

[BLACKBURN, J. The question whether, under the circumstances, there was a lien seems to be a novel one.]

The general principle is that, where any work is done affecting goods by a person lawfully in possession of them, he is entitled to a lien, and it is immaterial whether it is for general average or salvage: *Nicholson* v. *Chapman* (2); *Castellain* v. *Thompson.* (3)

Phillimore, in reply.

Cur. adv. vult.

(1) Law Rep. 2 A. & E. 289.
(2) 2 H. Bl. 254.
(3) 13 C. B. (N.S.) 105; 32 L. J. (C.P.) 79.

1876

HINGSTON v. WENDT.

Feb. 8. The judgment of the Court (Blackburn and Lush, JJ.), was delivered by

BLACKBURN, J. This is an appeal from the county court of Devonshire, holden at Kingsbridge, argued before my Brother Lush and myself, in which we took time to consider.

The case is not stated so explicitly as we could wish, but the material facts, as we understand them, are as follows:—The German brigantine *Theodor* had gone ashore near Dartmouth, with cargo on board of her. The plaintiff, a ship agent at Dartmouth, was put in possession of the wrecked vessel and cargo by the captain, with, as we understand the case, authority from the captain to do, as his agent, what was for the benefit of all concerned. The plaintiff did the work, and expended the money sued for in discharging the cargo, and he brought it to a place of safety, where he kept possession of it. The hull remained on shore, and ultimately broke up, and was sold as a wreck. We think we must take it on the statement to be the fact, that this expenditure was not incurred on behalf of the master as agent of the shipowner, performing his contract to carry on the cargo to its destination and earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk; and had the expenditure been for the purpose of saving the whole venture, ship as well as cargo, it would have constituted a general average, to which the owners of each part of the property saved must have contributed rateably, and the captain, and the plaintiff, as his agent, would have had a lien or right to retain each part of the property saved till the amount of the contribution due in respect of it was paid or secured. But this right would have been only in respect of the contribution due in respect of that part. He would have had no lien on the cargo for the contribution due, if any, in respect of the hull. But, as we understand the facts, there was in this case no contribution due in respect of the hull, for the expenditure was not for the purpose of saving, nor did it save the vessel. It was an extraordinary expenditure for the purpose of saving the cargo, and which did save the whole cargo. And the question, the answer to which will decide this appeal, is whether the captain, and the plaintiff, as his agent, had a right to detain the whole cargo, if it

belonged to one owner, till the whole was paid or secured, or if the cargo belonged to several owners, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured.

This is the point on which the case turns, for the defendant was not the owner of any part of the cargo at the time when the expenditure was made, and cannot therefore be made liable as having his credit pledged by the captain as his agent of necessity. He appears to have been a mercantile agent, to whom the owner of the cargo had transmitted the bill of lading to enable him to obtain the cargo on his behalf, and he did so obtain the whole of it. The defendant did not become liable to pay any contribution merely by the receipt of the goods, unless there was a promise, express or implied, to pay it in consideration of the person, who had a right to detain the goods till it was paid or secured, parting with the possession: *Scaife* v. *Tobin*. (1) In the present case there was an express promise by Captain Slight, the agent of the defendant, who obtained possession of the goods for the defendant from the plaintiff, that the plaintiff's charges should be paid, and though it was proved that Captain Slight had no special authority to make this promise, we think the county court judge was right in holding that his employment to obtain possession of the goods gave him authority to give security for any charges for which there was a lien on the goods. But we do not think his authority would extend to bind the defendant further than there was a lien given up.

As to the question whether there was a lien on the cargo for the expenses successfully incurred for the purpose of saving it alone, there is, considering how often the case must have occurred, a remarkable dearth of authority.

In insurance law, the phrase "general average" is commonly used to express what is chargeable on all, ship, cargo, and freight, and "particular average," to express a charge against some one thing. In Phillips on Insurance, c. 15, s. 1, subs. 1273, it is said, "General averages are usually cases of sacrifice for the entire interest at risk in ship, freight, and cargo, and hence called

(1) 3 B. & Ad. 523.

1876

HINGSTON v. WENDT.

'general.' But a contribution may be by part of those interests, where only a part is in peril and benefited by the expenses and sacrifices." And again, in c. 16, s. 4, subs. 1470: "Where expense is incurred on divers articles in common, the adjustment is made by an average on the respective articles according to their value." In *Moran* v. *Jones* (1) this Court held that the cargo, ship, and freight were, in that case, all saved by one continuous operation, but they expressed a decided opinion that if the expense had been incurred after the cargo was safe, for the benefit of ship and freight alone, they would, as between the two, have been general average, to which the ship and freight were to contribute rateably. This, we think, confirms the opinion expressed in Phillips on Insurance.

It may be said that these are only authorities that expenses of this kind are so far in the nature of general average that they can be charged against the articles, and must be paid for by the underwriters, and that it does not follow that the lien which is given for general average, strictly so called, also exists for the particular average chargeable against several articles in common, and so in the nature of general average. That may be true, but every reason for giving a lien for the contribution, when all are to contribute, exists for giving it when several articles are to contribute; and if, where the cargo belongs to several owners, there would be a lien on each part of the cargo for contribution from the owners of that part, it follows that there must be a lien on the whole cargo where it belongs to one only.

The captain is entitled, in case of need, to incur extraordinary expenses for the protection of a particular article, and in some cases he is compellable to do so: see *Notara* v. *Henderson*. (2)

In practice, such expenses are always in this country charged in the adjustment against the articles in respect of which they are incurred; and in the judgment of the Exchequer Chamber in the case just cited, delivered by Willes, J. (3), there are authorities cited to shew that such is the law in many foreign states. It is not expressly said that there is a lien on the goods for such a

(1) 7 E. & B. 523; 26 L. J. (Q.B.) 187. 3 Jur. N.S. 663.

(2) Law Rep. 5 Q. B. 346; 7 Q. B. 225.

(3) Law Rep. 7 Q. B. at p. 233.

particular average, but the hardship would be very great if a master was bound to make a disbursement for the benefit of the goods, and had no remedy if the goods-owner transferred the property and then became insolvent. And, as Willes, J., cites these authorities with a view to shew that there was no hardship in holding the master bound to make such disbursements, we think it is not too much to infer that this very learned judge thought there was such a lien, though it certainly was not decided that there was one.

The case is very analogous to general average and to salvage, in both of which there is a lien. It is just and convenient that there should be such a lien, and what scanty authority we can find all points in the direction of there being a lien, and we think that we must hold that there is one.

We could have wished that the necessity for the first time, as far as we can find, for expressly deciding this point had arisen in a case of more importance, in order that our opinion might be reviewed on appeal.

Two cases were referred to in the argument which have no bearing on the point, and we mention them only to shew that we have not overlooked them. They are *Nicholson* v. *Chapman* (1) and *Castellain* v. *Thompson*. (2) In the former case the plaintiff was a mere volunteer in saving the goods; in the latter the plaintiff was employed by a third person, who had no authority to incur expense for the owner.

Judgment for the plaintiff.

Solicitors for plaintiff: *F. J. & G. J. Braikenridge.*
Solicitors for defendant: *Druce, Sons, & Jackson.*

(1) 2 H. Bl. 254. (2) 13 C. B. (N.S.) 105; 32 L. J. (C.P.) 79.

1876
March 14.

[IN THE COURT OF APPEAL.]

GOLDING *v.* THE WHARTON SALTWORKS COMPANY.

Embarrassing Plea—Striking out—Order XXVII., Rule 1*—Discretion—Appeal.*

The striking out of pleadings as embarrassing, under Order XXVII., Rule 1, is a matter of discretion in the judge, and, as a general rule, no appeal from his order will be entertained.

A plea, to an action on a contract, that the plaintiff was suing on his own behalf, whereas he made the contract as agent for a company, will not be struck out as embarrassing.

ACTION for damages for the non-delivery of salt according to an agreement alleged in the statement of claim.

The statement of defence was that the plaintiff was not, on the 21st of April, 1875, a salt-merchant, but was agent for a company called Golding, Davis, & Co., Limited, and stated a written contract with him for the supply of salt, dated the 21st of April, 1875. The 10th and 11th paragraphs of the defence were as follows:—

"10. That the said document in writing was meant and intended by the parties respectively to refer only to the salt required by the said Golding, Davis, & Co., Limited, of which said company the plaintiff was then director and agent, and not to the plaintiff's requirements as a salt merchant at Liverpool.

"11. That the several requirements of salt, the non-delivery of which is complained of, were wholly requirements by the plaintiff's business as a salt merchant at Liverpool, and not the requirements of or for the said Golding, Davis, & Co., Limited."

The plaintiff applied to the master for leave to strike out the 10th paragraph of the defence, as tending to prejudice, embarrass, and delay the fair trial of the action, and to prevent the real question in controversy from being determined thereby. The master refused leave, whereupon the plaintiff took out a summons before Lindley, J., in chambers, by way of appeal. Lindley, J., dismissed the summons, and the Queen's Bench Division affirmed that order.

1876

GOLDING v. WHARTON SALTWORKS COMPANY.

March 14. The plaintiff moved, by way of appeal, for an order to strike out paragraph 10.

Crump, in support of the motion. The 10th paragraph of the defence says that this written document means what it does not mean. If the plaintiff joins issue on this he will be embarrassed; and there is an affidavit setting out the facts and shewing that this plea is tricky and dishonest. There is no real defence to this action, and the Order XXVII., Rule 1, is expressly aimed at such defences.

[JAMES, L.J. If we hear this affidavit and listen to the argument we shall be, in fact, trying the case on its merits.]

The plaintiff ought not, on the trial, to be embarrassed by this defence, or to be forced to go to the expense of a trial, if this is a good defence. The Judicature Act of 1873 distinctly gives an appeal from an order by a judge.

Crompton, for the defendants, was not called upon.

JAMES, L.J. As this is the first appeal which has come before us on a question of this kind, we desire to state the principles on which the Court will act in appeals of this kind.

The Court of Appeal in Chancery has laid down over and over again that, on a question which depends on the discretion of the judge, the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision; but, as a general rule, the Court of Appeal declines to interfere. Now that there is an appeal to this Court from a Common Law Division, it is more than ever desirable that this rule should be adhered to. There may be, first, an application to the master, then before the judge in chambers, then an appeal to the Common Law Division, and then an appeal to the Court of Appeal. And, if upon every interlocutory application of this kind, all these appeals were to be made, actions could never be tried and the expense would be enormous.

The rules (Order XXVII., Rule 1) say, that in order to prevent embarrassing pleas, the Court may order to be struck out any

1876

GOLDING v. WHARTON SALTWORKS COMPANY.

matter which may tend to prejudice, embarrass, or delay the fair trial of the action. But it is a question of discretion whether the pleading is embarrassing; and no doubt the Common Law Division will say that, except in an extreme case, they will not interfere with the discretion which the judge has exercised, and we, as the Court of Appeal, say the same thing with even more force.

That alone would be an answer to this application; but now that the case has been gone into, I may say that we think that Mr. Justice Lindley's order in chambers was quite correct. All the paragraphs relate to one defence, and without giving any opinion as to whether it is likely to be successful or not, the defendants have a right to raise this defence by pleading. The action is for not delivering salt according to a contract to deliver it in one way or another. Then the defence proposed to be made is, that at the time when the contract was made the plaintiff did not carry on business on his own account, but was the manager of a company, and that the contract was really with him as manager for the company, but that he is now using it for the purpose of obliging them to deliver any quantity of salt which he may require in his private capacity. Whether that is a good defence, it is not necessary for us now to give any opinion; but in our opinion the defendants are perfectly entitled to raise it by this pleading, and this paragraph is necessary to raise the question.

This appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Brook & Chapman, for T. Goffey, Liverpool.*

Solicitors for defendants: *Sharpe, Parkers, & Co.*

KOPITOFF *v.* WILSON AND OTHERS.

1876
Feb. 23.

Ship and Shipping—Contract of Affreightment—Implied Warranty of Seaworthiness—Obligation of Shipowner.

In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy.

In an action to recover damages for the loss of iron armour-plates, which were lost on board the defendants' ship, it appeared that the defendants, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and left to them the questions,—was the vessel at the time of the sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season; secondly, if she was not in a fit state, was the loss that happened caused by that unfitness:—

Held, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier.

ACTION for the loss of iron armour-plates delivered by the plaintiff to be carried on board the defendants' ship.

At the trial before Blackburn, J., at the London sittings after Hilary Term, 1875, a verdict was entered for the plaintiff, with leave to the defendants to move to enter a nonsuit.

A rule was obtained accordingly, and for a new trial on the ground of misdirection.

1875. Dec. 14. *Cohen, Q.C.* (*Butt, Q.C.*, and *J. C. Mathew* with him), shewed cause.

1876. Jan. 11. *Thesiger, Q.C.* (*Sir H. James* and *R. E. Webster* with him), in support of the rule.

The facts, course of trial, and arguments sufficiently appear in the judgment.

In addition to the authorities referred to in the judgment, the following were cited: *Lloyd* v. *General Iron Screw Colliery Company* (1); *The Freedom* (2); *Worms* v. *Storey* (3); *Dixon* v.

(1) 3 H. & C. 284; 33 L. J. (Ex.) 269. (2) Law Rep. 3 P. C. 594.
(3) 11 Ex. 427; 25 L. J. (Ex.) 1.

1876

KOPITOFF v. WILSON.

Sadler (1); *Thompson* v. *Hopper* (2); Abbott on Shipping, 3rd ed. p. 229; Roccus, Not. 19, pp. 57, 69; Molloy, bk. ii. c. 2, § 10; Wellwood's Sea Laws, t. 7, p. 22; Troplong, Contrat de Louage, bk. i. p. 335; Emerigon, Traité des Assurances, pp. 372, 375, s. 4; Maude and Pollock's Merchant Shipping, 3rd ed. p. 263.

Cur. adv. vult.

Feb. 23. The judgment of the Court (Blackburn, Quain, and Field, JJ.), was delivered by

FIELD, J. This is an action in which the plaintiff seeks to recover damages for the loss of a large number of iron armour-plates and bolts, which were lost on board the defendants' ship *Walamo*, on a voyage from Hull to Cronstadt.

The cause was tried before Blackburn, J., at Guildhall, at the sittings after Hilary Term, 1875. The declaration contained several counts, and amongst them was a count alleging that the defendants had warranted that the ship should be seaworthy and reasonably fit to carry the goods in question, and alleged that, by reason of a breach of such warranty, the goods were lost. There was also a count upon the bill of lading, alleging a promise to deliver, with the exception of certain perils, &c., and a loss not within any of the exceptions. The defendants denied the warranty, and also alleged that the cause of loss was within some of the exceptions.

On the trial it appeared that the plaintiff, who was an agent of the Russian Government, had entered into a contract with the defendants, who were shipowners at Hull, by which the defendants undertook to ship for Cronstadt, from time to time, large quantities of armour-plates, which the plaintiff was having manufactured in this country, at agreed rates of freight, varying according to the season of the year. The other terms of the contract are not material to the points raised before us.

Three armour-plates of great weight, from 18 tons to 15 tons weight each, were delivered by the plaintiff to the defendants for shipment, and were by them shipped on the 15th of September in the defendants' own steamship *Walamo*, under a bill of lading, containing many exceptions. The defendants themselves by their

(1) 5 M. & W. 405. (2) E. B. & E. 1038; 27 L. J. (Q.B.) 441.

3 Jur. N.S. 132.

own servants stowed the ship. The armour-plates were by them placed on the top of a quantity of railway iron, and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not a proper mode of stowing them. It was not disputed that the steamship was in herself a good ship, but it was contended on behalf of the plaintiff, that the mode of stowing these plates adopted by the defendants made her unseaworthy on this voyage. On getting out to sea she encountered bad weather, the wind being high and the sea rough, and she rolled heavily. There was conflicting evidence as to the degree of this bad weather, and the cause of this rolling; the plaintiff contending that the wind and sea were no more than at that season were to be expected, and that the rolling was owing to the improper stowage of the vessel; the defendants contending that there was an unusual storm which would have made any ship, however well stowed, roll. After the ship had been out at sea for some hours, one of the armour-plates broke loose and went through the side of the ship, which, in consequence, went down in deep water and was totally lost, with all her cargo on board.

The plaintiff's contention was, that the breaking loose of the plate was, because it was improperly stowed and secured; the defendants', that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. These contentions raised questions of fact for the jury. Leave was reserved at the close of the case to enter a nonsuit if the exceptions in the bill of lading protected the defendants under the circumstances.

The case thus was left to the jury. The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and after explaining to the jury what "reasonably fit" meant with reference to a North Sea voyage, and the other facts in the case, left the following questions to the jury:—

Was the vessel at the time of her sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt?

Second. If she was not in a fit state, was the loss that happened

1876

KOPITOFF v. WILSON.

caused by that unfitness? These questions were put in writing and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing-up, that they were "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they (the jury) think that the plates would not have got adrift when they did had the stowage been such as to put the ship in a fit state."

The jury answered the first question in the negative, and the second in the affirmative. No complaint has been made as to these findings not being justified by the evidence. Upon these findings the learned judge directed a verdict to be entered for the plaintiff for the agreed amount, 6550*l.*, and in Easter term, 1875, the defendants obtained a rule to shew cause why a nonsuit should not be entered pursuant to the leave reserved, or why there should not be a new trial on the ground "that the learned judge misdirected the jury in directing them that there was an absolute obligation on the shipowner to make his ship seaworthy as regards the stowage, and that he would be liable if, in consequence of the non-performance of that obligation, the goods should be lost." That part of the rule which prayed for a nonsuit, although not expressly abandoned for any future purpose, was not attempted to be supported before us. And with regard to the remaining portion of the rule we took time to consider our judgment, not because we entertained any doubt as to the correctness of the direction of the learned judge, but because the case involved considerations which rendered it desirable that our reasons should be fully and explicitly stated.

2 Q.B.D. 459, 460

We think that the rule must be discharged. We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. For this proposition we have

the high authority of Lord Tenterden, who lays it down in the first edition of his book, published in 1802, and for the correctness of which he vouches Emerigon, Roccus, and other eminent writers and commentators upon the subject; Abbott on Shipping, 1st ed. p. 146. The accuracy of the proposition thus stated in 1802 has not, that we are aware of, ever been brought into question in any of the subsequent editions, or of the numerous text books since published on the subject. In further support of the implication of such a warranty, we have the authority of Lord Ellenborough, who, in the case of *Lyon* v. *Mells* (1), lays it down that it is a part of the contract on the part of a carrier or lighterman implied by law, that his vessel is tight and fit for the purpose or employment for which he offers it; and although it is true, as was pointed out by Mr. Thesiger in his argument, that the warranty thus expressed by Lord Ellenborough is expressed in terms limiting it to a contract for the carriage of goods by a person holding himself forth as the owner of a lighter ready to carry goods for hire, the measure of liability thus laid down by him has been considered generally applicable to any contract for carriage (per Blackburn, J., in *Readhead* v. *Midland Ry. Co.* (2), and in the cases of *Havelock* v. *Geddes* (3) and *Stanton* v. *Richardson* (4), and in the Exchequer Chamber (5), the judgment in which has recently been affirmed in the House of Lords), was actually applied to contracts for carriage by charterparty.

In further support of this proposition, the existence of such a warranty, as a general implication arising in all contracts of shipment, was universally recognised or assumed in the opinions expressed in the case of *Gibson* v. *Small.* (6)

We further find that the same doctrine obtains in the American Courts: 1 Parsons on Shipping, p. 171. It appears to us also that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine policy the assured comes under an implied warranty of seaworthiness to his assurer, and if we were to hold that he has not the benefit of a similar implication in the contract which he

(1) 5 East, 428.
(2) Law Rep. 2 Q. B. 434.
(3) 10 East, 536.
(4) Law Rep. 7 C. P. 421.
(5) Law Rep. 9 C. P. 390.
(6) 4 H. L. C. 353.

1876

KOPITOFF v. WILSON.

makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship.

The main argument addressed to us on the part of the defendants, however, was that it was not intended by the propositions and authorities which we have above referred to to assert the existence of an independent implication of warranty applicable to every contract of carriage by water, but that the doctrine thus asserted was a subordinate part of the more extensive liability attaching to carriers, and that inasmuch as the latter were bound to carry safely and securely (the act of God and the Queen's enemies alone excepted), it was by virtue of that obligation, and not of any specific contract to be implied, that the duty arose. It was therefore said that the defendants, not being common carriers, there was no room for any such implication in the present case.

But we have already pointed out that, although it is strictly true that Lord Ellenborough's proposition in *Lyon* v. *Mells* (1) is in its terms confined to carriers, or persons holding themselves forth as ready to carry, the principle itself has always received a wider application; and in the cases of *Liver Alkali Company* v. *Johnson* (2), and *Nugent* v. *Smith* (3), in the observations of the Courts, the existence of the warranty in question on the part of a shipowner is asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a public carrier.

Mr. Thesiger, however, in his able argument mainly and very properly relied on the judgment in the Exchequer Chamber in *Readhead* v. *Midland Ry. Co.* (4) The point decided in that case

(1) 5 East, 428.
(2) Law Rep. 7 Ex. 267; 9 Ex. 338.
(3) 1 C. P. D. 19.
(4) Law Rep. 4 Q. B. 381.

was that the obligation of a carrier of passengers by land did not extend so far as to warrant the roadworthiness of the carriage supplied by him against latent defects, and did not, therefore, directly decide anything as to the obligation of a carrier by sea of goods to warrant the seaworthiness of his ship even against latent defects; but we think Mr. Thesiger was justified in saying that the reasoning of the judgment threw doubt upon that position. The more recent case of *Francis* v. *Cockrell* (1), also in the Exchequer Chamber, we think, establishes that the obligation or warranty, even on land, extends to everything except latent defects, which could not by any reasonable diligence or skill be discovered. In the case now before us there was no necessity to consider the law as to latent defects, or to direct the jury on that point, for nothing of the sort was suggested.

We think that it is not a misdirection, entitling the party against whom the verdict passes to a new trial, if the judge makes an inaccurate statement of the law on some point not involved in the issue, and on which the jury required no direction; and consequently we need not express any opinion on this point. We are not, however, to be understood as intimating that the ruling in this respect was wrong.

Rule discharged.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendants: *Lowless & Co.*

(1) Law Rep. 5 Q. B. 501.

1876
Feb. 25.

[IN THE COURT OF APPEAL.]

DIXON *v.* THE LONDON SMALL ARMS COMPANY (LIMITED).

Patent—Infringement—Rights of Crown—Manufacture of Patented Articles under Contract with the Crown.

The defendants entered into a contract with the secretary for war, acting for the Crown, to provide and deliver according to specifications, 13,000 rifles at a certain price each, the Government supplying the stock and the tube for the barrel of each piece. The defendants made and delivered the rifles, and in carrying out the contract the defendants necessarily infringed a patent for breech-action, of which the plaintiff was the sole assignee. The plaintiff brought an action against the defendants for this infringement:—

Held, first, affirming *Feather* v. *Reg.* (6 B. & S. 257; 35 L. J. (Q.B.) 200), that the Crown, under letters patent in the usual form, by granting the sole and exclusive user of the patent to the patentee, left untouched the right of the Crown itself to the use of the patent.

Secondly, reversing the judgment of the Queen's Bench, that the contract of the defendants was for the manufacture of the rifles, and not for the sale of rifles already manufactured; that the principle of *Feather* v. *Reg.*, therefore, applied: for that it was immaterial whether the manufacture was by servants of the Crown or through the employment of an independent contractor, in either case the user of the patent was the user of the Crown itself; and the defendants were therefore entitled to judgment.

Overruled by H. of L. 1 Ch. Cas. 632 H. of L.

APPEAL from the judgment of the Court of Queen's Bench in favour of the plaintiff on a case stated by an arbitrator, the Court to draw inferences of fact. (1)

1. The plaintiff is the managing director of the National Arms and Ammunition Company (Limited), a company established for the manufacture and sale of small arms, and, amongst others, for the manufacture of the Martini-Henry rifles, and the plaintiff alleges that he is the assignee of the several letters patent mentioned in the first five counts of the declaration, and that he is duly registered as the proprietor.

2. The defendants are the London Small Arms Company (Limited), a company established under the Joint Stock Companies Acts, 1862 and 1867, with limited liability, for the manufacture and sale of small-arms to the public, and carrying on their business at Victoria Park Mills, Old Ford.

(1) Law Rep. 10 Q. B. 130.

1876

DIXON v. LONDON SMALL ARMS CO.

3. This action is brought by the plaintiff, as such assignee, for the alleged infringement by the defendants of the several letters patent in the manufacture of the rifles and parts of rifles hereinafter mentioned.

4. For the purposes of this case the defendants admit the validity of the letters patent and the title of the plaintiff.

The letters patent were in the usual form, but as much argument turned on the particular terms it is necessary to set out parts of the letters patent for the Martini breech-action.

After reciting that C. K. Prioleau was possessed of an invention for the improvement of breech-loading fire-arms, which had been communicated to him from abroad by Martini, the Queen granted—

Unto the said C. K. Prioleau, his executors, administrators, and assigns, Our especial licence, full power, sole privilege, and authority, that he, the said C. K. Prioleau, &c., by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as he, &c., shall at any time agree with and no others, from time to time, and at all times hereafter during the term of years herein expressed, shall and lawfully may make, use, exercise, and vend the said invention within our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, in such manner as to him, the said C. K. Prioleau, &c., shall in his or their discretion seem meet. And that he, the said C. K. Prioleau, his executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention for and during the term of years herein mentioned, to have, hold, exercise, and enjoy the said licences, powers, privileges, and advantages, hereinbefore granted, or mentioned to be granted, unto the said C. K. Prioleau, his executors, administrators, and assigns, for the full term of fourteen years from the day of the date of these presents (31 October, 1871), next and immediately ensuing, according to the statute in such case made and provided.

Then followed the usual prohibition against "any person, bodies politic and corporate, and all other our subjects within the United Kingdom, &c.," using the invention during the above term. There were also the usual provisoes, one being as follows:—

And also if the said Charles Kuhn Prioleau, his executors, administrators, or assigns, shall not supply, or cause to be supplied for our service, all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service, for the use of which the same shall be required in such manner, and at such times, and at and upon such reasonable prices and terms as shall be settled for that purpose, by the said officers or commissioners requiring the same: That then, or in any of the said

1876

DIXON v. LONDON SMALL ARMS CO.

cases, these our letters patent, and all liberties and advantages whatsoever hereby granted shall utterly cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

5. The acts complained of as infringements are as follows:—On the 16th of April, 1872, the defendants tendered to the secretary of state for war for the supply for the public service of 13,875 Martini-Henry rifles, and on the 29th of April, 1872, the tender was accepted by the secretary of state, and a contract was entered into at the price and on the terms mentioned in it.

Tender for rifles. Terms and conditions of the contract:—

1. The articles required are to be of the qualities and sorts described, and equal in all respects to the patterns, or samples and specifications, which may be inspected, on application, as herein directed; and to be delivered by the contractor at his own expense, in times specified, into the charge of the officer at the station named, accompanied by an invoice in duplicate, and no article that is rejected under s. 2 shall be considered as having been delivered under the contract.

2. Previous to the articles being received into store, they will be examined by the officer or officers appointed for that service, and if found inferior or defective in quality, they will be rejected, and the contractor is to remove the same at his own expense within ten days after he is required so to do, without any allowance being made to him for such rejected articles.

3. Samples will be lent to the party whose tender may be accepted, upon payment of a deposit. The samples to be returned with the supply, when the deposit will be repaid. The contractor should carefully compare the samples lent with the standard patterns, and understand that the specification and the standard patterns alone will govern the reception or rejection of the supply.

4. The stores will be inspected within thirty days from their delivery (except in such cases where a longer period may be stated in the specification), and a certificate passed to the accountant-general, within ten days afterwards, for such quantities as may have been found of proper quality.

There were other terms which are immaterial. And at the end the defendants, by their managing director, signed the following:—

We, the undersigned, do hereby agree and bind ourselves to provide and deliver the articles enumerated in the list or schedule, hereunto annexed, to which we have affixed prices, within the period specified, in said schedule, and we do hereby agree to abide by and fulfil all the terms and conditions above-mentioned, or in default thereof to forfeit and pay to her Majesty, her heirs, or successors, such penalties or sums of money as are above mentioned. 16 April, 1872.

The schedule was as follows:—

Control Office, Tower, 8/3/72.

13,875 rifles Martini-Henry, without swords, bayonets, or scabbards, at 3*l.* 10*s.* each, less 7*s.* 6*d.* each for steel tube, and 2*s.* 2*d.* each for stock.

Patterns and specifications to be seen at the Royal Small Arms Factory, Enfield.

Materials for barrels and stocks will be issued from the Government Stores.

The viewing, as required by specification during the process of manufacture, will take place at Old Ford, Bow, E.

The arms are to be taken over by the superintendent, Royal Small Arms Factory, at the company's manufactory, at Old Ford.

The deliveries of these rifles are to commence six months after receipt of correct patterns and gauges, and to proceed at the rate of 1200 per month.

5475 to be completed by the 1st March, 1873, and the whole by 1st January, 1874, or sooner if required.

6. The defendants, in pursuance and performance of the contract, made, manufactured and delivered, according to the terms stated in the contract, a portion of the 13,875 Martini-Henry rifles, which were accepted from the defendants by the secretary for war for the use of her Majesty and the public service, and the defendants have been paid for a part of the rifles so made, manufactured, and delivered. For the purpose of this case, the defendants agree that the rifles so manufactured for and accepted by the secretary of state under the contract would, but for the fact that they were manufactured and delivered to the secretary of state for the public service and use of her Majesty, and under the said contract, have been infringements of the plaintiff's letters patent.

7. Up to the time when the question, in what respect the rights of the Crown are affected by the grant of letters patent for inventions, was raised in the cases of *Clare* v. *Reg.* (1) and *Feather* v. *Reg.* (2), it had been the practice in many cases where patented inventions were used for the public service in any of the government departments, for the patentees, who were in most instances the inventors, to be remunerated by direction of the ministers or officers of the Crown administering such departments, and licences were granted to and taken by the said ministers or officers of the Crown, which licences in many cases were granted on terms, that even where the patented articles were made in the government establishments, royalties should be paid thereon in the same way as though the use had been by private individuals. On several occasions the Attorney General, appearing for and on behalf of the Crown, on an application for the prolongation of a patent before the Judicial Committee of the Privy Council, has applied to the committee for the insertion, in the renewed patent, of a condition

(1) Not reported.

(2) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

that the Crown should have the right to use the invention without payment of any royalty, which application has been in some instances refused by the Judicial Committee.

The question for the opinion of the Court was, whether under the above circumstances the plaintiff is entitled to recover against the defendants for infringement of either of the patents.

Feb. 10. *Sir J. Holker, A.G.* (with him *C. Bowen*), for the defendants. The Court of Queen's Bench assumed that the decision in *Feather* v. *Reg.* (1) was right, namely, that the Crown by the grant of letters patent did not exclude itself from the use of the patented article; and that this extended to the manufacture of the article by the servants of the Crown in the government workshops; but they held that it did not extend to the case of a contract by the Crown for the supply by an independent contractor of the patented article; and they held that it made no difference whether the contract was for the supply of the article already made, or for the future manufacture of the article. It is not necessary to argue more than this, assuming *Feather* v. *Reg.* (1) to be good law: first, it is clear from the facts and documents in the case that this was a contract for the future manufacture of rifles; and, secondly, therefore the principle in *Feather* v. *Reg.* (1) applies; for there can be no distinction whether the Crown orders its own servants to manufacture, or gets its agent, an independent contractor, to do so; in either case the manufacture is by the Crown.

Feb. 10, 14, 25. *Sir W. V. Harcourt, Q.C.*, and *Aston, Q.C.* (with them *Macrory*), for the plaintiff. This is a contract to provide and deliver, not to manufacture; but there is no real distinction, and the Court of Queen's Bench so held. The real distinction is whether the defendants were contractors or servants, and, as they manufactured at their own risk—for the rifles might be rejected if not approved—it is clear they were manufacturing as contractors, and contractors of such a nature as not to be the mere agents of the Crown in the manufacture, so that the privilege of the Crown, if such there be does not extend to them. Secondly, *Feather* v.

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

Reg. (1) cannot be supported. It may be observed that if the logical conclusion from *Feather* v. *Reg.* (1) is that the contractor who contracts to manufacture for the Crown is in the same position as a servant, then the decision of the Court of Queen's Bench in the present case has overruled the previous decision in *Feather* v. *Reg.* (1) The form of the patent, both the granting and prohibitory part, shews that the user by the Crown is not intended to be exempted; and this is still further shewn by the proviso near the end for the cession of the patent if the patentee does not supply the articles of invention to the Crown in such numbers as it may require; for if the Crown had retained the general right of user, this clause would have been unnecessary. It is also to be observed that the grant is for a good consideration, that the patentee will make public the invention for the use of the public, so that it shall become the property of the public at the end of the term; the usual doctrine, therefore, as to prerogative grants by the Crown does not apply to this case. [They referred to *Prince Albert* v. *Strange* (2), *Millar* v. *Taylor* (3), and 2 Stephen Com. p. 551.]

C. Bowen, in reply.

KELLY, C.B. This is an action for the infringement of a patent for the exclusive manufacture and use of the Martini breech-action to be applied to rifles. For the purposes of the case the patent is to be taken as valid, and the plaintiff as the assignee, and the defendants are to be taken to have infringed it, so that judgment must go against them, unless their defence is valid. Their answer to the plaintiff is that they claim to justify their acts, which would otherwise have been infringements of the plaintiff's patent, as acts done under the authority of the Crown. They say they manufactured these rifles under the express direction of the Crown, under contract indeed with the Crown, but also under the employment of the Crown.

Upon this defence two questions arise. The first is, whether the Crown is bound by any provisions in any Act of Parliament under which patents are granted, that is, whether the sovereign, without

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200. (2) 2 De G. & S. at p. 695.
(3) 4 Bur. 2303.

1876

DIXON v. LONDON SMALL ARMS CO.

Kelly, C.B.

an express reservation to herself, has the right to use the patent exactly as the patentee himself, without his permission or licence, and without making any compensation?

The ground on which I am of opinion that such a right exists, is that the Crown is not bound by any Act of Parliament unless it is either expressly named or referred to in such terms as by necessary implication to shew that it was intended to include the Crown. The Crown is not named in this patent in any such terms as to lead to such an implication; and therefore, upon that ground alone, I am of opinion that the Crown is not restrained from the unlimited exercise of the right to manufacture the article for the manufacture of which the patent was granted.

But further, there is also the maxim, which is said to be the chief foundation of the decision in *Feather* v. *Reg.* (1), namely, that letters patent, being a grant by the Crown, should be construed most favourably to the Crown, the grantor, and against the patentee, the grantee; differing in that respect from the construction put, in general, upon grants as between subject and subject.

These being the general principles governing the construction of a grant of patents, as of every grant of the Crown, whether under statute or at common law, or by virtue of the Crown's prerogative, we have to consider whether the case of *Feather* v. *Reg.* (1) is not decisive upon the whole question in this case.

This patent having been granted by the Queen in the usual terms, we have to consider, whether that case is not conclusive, upon one or both of the grounds or maxims I have already adverted to, that the Crown has, without express words, in effect reserved to itself the use of the patent at its free will and pleasure, without any restriction or compensation to the patentee.

But before I refer, which I shall do very briefly, to the language of the Court on the general proposition, I would advert to the point made as to the proviso in these letters patent, which is founded on the maxim, expressio unius est exclusio alterius. Now there was a similar proviso in the letters patent in *Feather* v. *Reg.* (1), not only a grant in the strongest terms of the sole and exclusive use of the patent by the patentee himself, but a proviso or condition that the patentee should supply the patented article

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

for the use of the Crown on such terms as should be settled by the officers of the Crown; and it was argued, with some semblance of an argument, that on the above principle the introduction of this clause must have the effect of excluding the general right of the Crown. But the Court gave no weight to that argument.

I need not go at length into the facts of that case. The terms of the patent were as favourable to the patentee as can well be imagined; and after all the arguments had been urged, and all the cases referred to bearing on the subject, we find the Court saying this: "Our view as to the construction to be put on the terms of a grant of this nature becomes materially confirmed by what is clearly settled to be the law in respect of another class of grants emanating from the same branch of the prerogative. By virtue of its authority in matters of trade and commerce, the Crown, from a very early period, exercised the power of granting to individuals the right of holding fairs and markets, and, as incidental thereto, of taking tolls. Now it is clear that, however general and universal by the terms of the grant the right to take toll may be as against the rest of the world, the Crown will nevertheless be exempt from toll;" and in support of this, 2 Inst. 221, and Com. Dig. tit. Toll (G. 1), are referred to, and the judgment proceeds: "This appears strong to shew that in granting a privilege, otherwise of universal application, the Crown will not be bound, unless it expressly declares its intention to that effect; and that grants of privilege, however general in their terms, can, in the absence of express words to bind the Crown, be taken only as conferring the privilege as against the subject, exclusive of the Crown." (1) That is really conclusive of the whole question. There is the language of the Court, clearly deciding that the Crown will not be bound unless it expressly declares its intention to be bound.

We have now to consider whether the present case is distinguishable from *Feather* v. *Reg.* (2), and in looking through the arguments and judgments of the Court I am at a loss to see what the distinction can be. I may observe in passing, that although we are now asked to overrule *Feather* v. *Reg.* (2), when the case was before the Queen's Bench not a single judge threw out

(1) 6 B. & S. at p. 286; 35 L. J. (Q.B.) at p. 205.
(2) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

Kelly, C.B.

a word of disapproval of that case. However, the Lord Chief Justice makes this distinction, after saying that *Feather* v. *Reg.* (1) decided that there was nothing in a grant of letters patent to exclude the Crown itself from the use of the patented article, he says: "But this case is very different. The manufacturer in this case entered into a contract to furnish certain articles. To my mind there is nothing in principle which creates any difference between articles sold to the Crown and articles manufactured under a contract for the use of the Crown." (2) But I think there is this obvious distinction: If a man were to contract to supply 13,000 of these patented rifles to the Crown for a certain sum, he must either have purchased them himself, in which case he would have paid directly or indirectly the patentee, or he must, with or without the authority of the patentee, have manufactured them himself, in which latter case he would have been guilty of an infringement of the patent. But the case is surely different where the manufacture of the patented articles has been itself effected under a contract with, and by the direction and authority of, the Crown. And the question, therefore, arises, whether the defendants' contract with the secretary for war was a mere contract of sale and purchase, or a contract for the manufacture by the defendants of these 13,000 rifles. Now, though there are general words in the tender, that the defendants "agree to provide and deliver," which may be ambiguous, and would allow of either construction, yet it is impossible to read the second, third, and fourth clauses without seeing that it is a direct authority from the Crown, through the secretary for war, to manufacture these rifles. It is expressly stated in the case that "the defendants, under and in pursuance and in performance of the said contract on their part, *made, manufactured,* and delivered, according to the terms stated, a portion of the said number of 13,875 Martini-Henry rifles, which said rifles were accepted by the secretary for war for the use of Her Majesty and the public service, and the defendants have been paid for the same rifles so *made, manufactured,* and delivered." Without more, I should say, if the case rested there, that it was a case in which the Crown directly employed the company to manufacture 13,000 rifles, and that there was no difference in con-

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200. (2) Law Rep. 10 Q. B. at p. 135.

templation of law between the Queen manufacturing these rifles herself, that is, in the workshops belonging to the government, or by an independent manufacturer or contractor: for neither the Queen nor her officers can manufacture with their own hands, and the Crown does in effect use the patent itself where the Queen by her officers directs either her own servants or independent persons to manufacture the article for her use. But when we look at the schedule at the foot of the tender, the matter is made still clearer. For, the defendants having agreed to provide and deliver the articles enumerated in the list or schedule annexed, to which they had affixed prices, within the period specified, we find in the schedule: "13,875 rifles, Martini-Henry, without sword bayonets or scabbards, at 3*l.* 10*s.* each, less 7*s.* 6*d.* each for steel tube and 2*s.* 2*d.* for stock. Pattern and specifications at the Royal Small Arms Factory, Enfield. Materials for barrels and stocks will be found from the government stores." So that the most bulky part of the rifles, if not the most important, the barrels and stocks, are furnished by the Crown, and the defendants are employed to manufacture or work upon these, and complete the perfect rifle for the Crown. What can be clearer than that the defendants' contract is one of manufacture? Under these circumstances, what question might arise if this had been a mere contract for sale and purchase we need not inquire. We have the Queen, through the secretary for war, authorizing, directing, and contracting with the defendants for the manufacture of these rifles, formed of a great number of component parts; and I am utterly at a loss to conceive what difference there is between that being done by a firm or company, or any other contractor, and by 100 workmen, under some superintendent paid for the purpose, in one of the government factories. The case, therefore, appears to me to fall directly within the principle of *Feather* v. *Reg.* (1)

I would observe, in conclusion, that this power in the Queen, like all other branches of the prerogative, is for the benefit of the public. That power is of the very highest importance to the very first requirements of the nation. Supposing a war to break out, it may be of the greatest importance that 100,000 rifles

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

Kelly, C.B.

should be supplied with the least possible delay to enable our armies to take the field, and without waiting until one patentee could supply one part and another patentee another part. It is, therefore, greatly for the the benefit of the nation itself that the Crown should have the power to take into its own hands the entire manufacture, irrespective of the rights of patentees.

I hold, therefore, that the law is as I have endeavoured to lay it down; and the consequence is, that this, being a manufacture by the direction of the Crown, is really and in effect a manufacture by the Crown itself, and is privileged; and the defendants, who have been the instruments of the Crown in the manufacture, are within the immunity and prerogative of the Crown and exempt from any action or claim at the suit of the patentee.

JAMES, L.J. I am of the same opinion. Whatever may have been the ideas prevalent in the public mind, and in certain legal minds, as to the extent of the obligation of the Crown with respect to the rights of patentees before the case of *Feather* v. *Reg.* (1), it appears to me, when the question once was raised for decision before a legal tribunal in this country, it would have been impossible for any lawyer to arrive at any other conclusion than that which the Court of Queen's Bench came to in that case, having due regard to the well-established principles which have at all times prevailed in this country as to the construction of grants of the Crown, and as to the construction of Acts of Parliament, by which the Crown is supposed, and might be supposed, to be bound. I say it seems to me that the moment the question was raised and stated as a mere legal question for the decision of a legal tribunal, it was impossible to hold that there is anything in any letters patent which extended to the Crown itself the prohibition or injunction which the Crown, by letters patent, imposed upon its subjects, or anything by which the Crown could be supposed to be entering into a covenant or bargain with the patentee that the Crown was not itself to use the invention.

It appears to me that *Feather* v. *Reg.* (1) was decided upon principles impossible to be questioned, and that that case is now a binding authority. Starting with that, it appears to me that the

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

James, L.J.

decision of *Dixon* v. *London Small Arms Co.* (1) which we have to deal with (with all respect to the learned judges who decided it), is a decision which is given in violation of what, it appears to me, are equally well-settled principles of law in this country. It has been settled in all kinds of cases that what a person may lawfully do himself he may lawfully do by his attorney, his bailiff, his contractor, his agent, his servant, his workman, and it is a sufficient plea in certain cases that the thing was done by the authority, at the request, or on behalf of the person who had a legal right to do it. Almost every great work in this country is done by contractors, who act under the authority of the bodies who have received authority from Parliament to do what is required to be done.

If it be the case, as it appears to me to be the case here, that what was done was done by the authority, and the express authority, for the use and for the benefit, of the Crown, it is, in my mind, merely saying that it was done by the Crown. The Crown has done it by such person or persons, in such a way, and under such circumstances as the officers of the Crown thought fit to do it. When it was stated in the Court of Queen's Bench that there was nothing in principle that created any difference between articles sold to the Crown and articles manufactured under a contract for the use of the Crown,—I say it with all unfeigned deference and respect for those who so stated,—it appears to me there is a difference between an affirmative and a negative in the two propositions; because in the one case the man would be able to allege with truth that he has done it at the request or by the command and for the use of the Crown, in the other case he would not be able to allege that he had so done it. He could only prove that he had done it for his own use on speculation, and the wrong which he had committed would not be purged by the fact that the Crown or the Crown's servants had subsequently made an independent bargain with him for the articles already made.

It appears to me there is this distinction: in the one case it is a manufacture for themselves; in the other case it is precisely the same, it seems to me, as if the Crown had hired the defendants' warehouse and their servants, and had so employed the defendants

(1) Law Rep. 10 Q. B. 130.

1876

DIXON v. LONDON SMALL ARMS CO.

James, L.J.

to manufacture for them. For whether the Crown pays a sum for the article manufactured in the workshop in gross, or pays a sum for the servant, and pays somebody for superintending it, it seems to me the same thing. That is, the articles themselves are made, manufactured, and delivered by the order and for the use of the Crown, and therefore they are within the right of the Crown to manufacture for its own use.

MELLISH, L.J. I am of the same opinion. I entirely concur with the reasons given in the case of *Feather* v. *Reg.* (1) for that judgment. It appears to me necessarily to follow from the well-established rule of law, that in the construction of Acts of Parliament, and in the construction of grants by the Crown, the Crown is not bound unless expressly mentioned. By which I understand that an Act of Parliament or a grant professing to bind all persons in general is not sufficient to bind the Crown, but that it must in terms say that it is intended to be applicable to the case of the Crown. I can see no reason why the grant of letters patent is not to be construed like all other grants on behalf of the Crown.

It is said that it amounts to a contract between the government and the patentee, and that consideration is given. No doubt for certain purposes learned judges in considering patents have treated them as if they were contracts, but when you look at the patent itself, it professes to be a grant, stating that the patentee has found out a certain invention, and it would be a benefit to the public that he should have letters patent; and then there is a grant which purports in terms to be a grant from the Crown, and that grant is made subject to a variety of conditions, upon the non-compliance with which the patent is to be forfeited. The patentee does not bind himself to do anything, but certain conditions are imposed by the Crown, upon non-compliance with which the patent is lost. Almost the entire argument which has been presented to us for the purpose of shewing that it is in the nature of a contract, and for the purpose of shewing that it was intended to bind the Crown, has depended upon those conditions. But most of those conditions (I rather think almost all of them) have been inserted in letters patent from time to time since the Statute

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

of Monopolies. And it is perfectly obvious that, if the Crown would not have been bound by a patent granted the day after the Statute of Monoplies had passed, and when there were no conditions at all, the mere fact that, out of precaution and for the benefit of the public, the Crown has since thought fit to insert a number of conditions in the letters patent, cannot alter the construction which previously prevailed, and make that a grant binding the Crown which previously was a grant only binding the subjects of the Crown, and not binding the Crown itself.

Therefore I am of opinion the Crown is not bound. Then the Crown, not being bound, is entitled to use the invention specified in the letters patent for the purposes of the public; the Crown is entitled to get the patent article manufactured; and the question we have to decide is (and this is the only question upon which we differ from the Court of Queen's Bench) admitting that the Crown is entitled to get the thing manufactured by its servants, is the Crown also entitled to get it manufactured by employing a contractor to manufacture it? I think our difference with the Court below arises partly upon the construction of the contract itself. Some of the learned judges seem only to have looked at the printed part of the contract, which consists, first, of the form of tender which is published by the government, and which contains the general conditions of the contract, and which the parties see before they tender, and the acceptance of an offer under the tender which is contained in it, without considering that it refers to a schedule, and that the most material parts of the contract are really contained, not in the printed part, but in the written schedule annexed to it. In the written schedule, when we look at the contents of it, it is plain the Crown was to provide the steel tube and the stock for each rifle, and that then the contractor was to manufacture the steel tube and the stock into a perfect Martini-Henry rifle, which was to be inspected during the process of manufacture by the Crown's officers at the particular place where it was to be manufactured. Therefore it plainly was a contract to manufacture certain articles for the purposes of the Crown.

Now if the Crown has the right to have the patented articles manufactured by its servants, has it not the right to have them manufactured by entering into a contract with a contractor? What

1876

DIXON v. LONDON SMALL ARMS CO.

Mellish, L.J.

is the difference between the relation of employer and contractor, and the relation of master and servant? No doubt there is one perfectly well-established difference between them, namely, that the master is answerable for the acts of the servant done in the course of the employment, even though they are not expressly authorized by him. He is answerable for the negligent acts of the servant, and for any acts done by the servant, if they are within the scope of his general authority in the course of the employment. Whereas, in the case of a contractor and employer, the employer is not answerable for the acts of the contractor, if done negligently, which are done in the course of executing the contract, but which are unauthorized by him. But as far as his acts are expressly authorized by the contract, I am not aware that there is any difference between the relation of employer and contractor and master and servant; the acts of the contractor expressly authorized by the contract are the acts of the employer. That may be illustrated by the cases which happen every day with reference to contracts for railway companies. If a railway company employs a contractor to do any one of the numerous works which the railway company are authorized to do by Act of Parliament, there is no doubt at all that the contractor may justify doing the act under the authority of the railway company. If, on the other hand, the railway company employs the contractor to do any act which is illegal, and which they are not authorized to do by Act of Parliament, then the person who is damaged by that illegal act may bring his action, not only against the contractor who does that act, but against the railway company who is his employer. The act of the contractor expressly authorized by the contract is the act of the employer, just as much as the act of the servant is the act of the master. Therefore when the Queen employs these defendants to manufacture her stocks and barrels into these Martini-Henry rifles, that is really, in point of law, the act of the Queen herself, and the contractor may justify just as the servant may justify. I should rather think it would be found, if you referred to the old system of pleading, such as was used in the days of special demurrers, you might justify in the same words. It would not be necessary to say whether the act was done in the relation of master and servant or employer and contractor; but it is sufficient

to say that a certain person was entitled to do the act, then to say by the authority of that person, whether master or employer, the defendant did the act in question; and that would be proved by shewing that he was employed as a contractor to do it, or by shewing that he was employed as a servant to do it.

Therefore it is impossible to make any legal distinction between the two cases. Consequently, as I think that *Feather* v. *Reg.* (1) was rightly decided, I am of opinion that it necessarily follows that the defendants have a good defence to this action.

GROVE, J. I am of the same opinion. I think that *Feather* v. *Reg.* (1) was rightly decided, and I do not intend to go over the grounds of that decision, but only to advert to one or two points which have been pressed in argument before this Court. It has been said, admitting that the Crown is not bound except expressly named in the patent, that (although it cannot be contended that the Crown is in terms expressly named) yet, from the words which are used, the necessary implication arises, tantamount to the naming of the Crown, and that the Crown is in fact bound by this grant; not because the Crown eo nomine is named, but because there is one clause in the letters patent which cannot be fairly construed without assuming that the Crown is bound by them. But I do not read the letters patent as containing anything or importing any such construction as would lead or force us to assume that the Crown was bound. The first branch of this argument—which is the only argument I think it necessary to advert to—is that the grant is for the sole use and exercise of the said invention. It is said that the word "sole" there excludes the Crown from the use of the patent, but if the clause is read it shews it is the sole use as against her Majesty's subjects; and the next proviso or prohibition is "that they shall not, during the continuance of the term of the patent, make, use, or put in practice the said invention." There is not a word there about any understanding on behalf of the Crown that the Crown itself should be bound by this injunction upon the subjects of the Crown.

Then it was said that there are certain dicta and judgments of learned judges—especially of Lord Eldon—which say that the

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

Grove, J.

terms of the patent are a bargain between the Crown, acting on behalf of the public, and the patentee. In one sense the term "bargain" may be used. The Crown in granting a monopoly to one subject, as against the remaining subjects of the Crown, has to see, on behalf of the public, that the monopoly is not abused; and for that purpose the Crown insists, and has insisted from time to time, upon proper provisoes being inserted, such as that the invention shall be accurately described, and so on. In the reign of Queen Anne, considerably after the statute of James, whereby these letters patent were legalized, if I may say so, to the true and first inventors, that important proviso was put in, that the patent should be void unless those provisoes were complied with, but not as making the Crown a party to a deed in the nature of a covenant, so as to enable the patentee to sue the Crown as upon a contract, not as a bargain on the part of the Crown, upon which the Crown itself could be sued. Several other clauses and provisoes for the protection of the public have been inserted in letters patent; not provisoes which should bind the Crown itself, but provisoes which tell the patentee, "If you do not comply with the stipulations your patent will be void."

And now I come to the only other remark which I shall make upon *Feather* v. *Reg.* (1), which struck me as the most plausible argument in this case in favour of the judgment that the learned counsel was supporting, which was the clause for the supply of the patented articles, for it does not apply only to arms: "If the said patentee shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required, in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same, that then, and in any of the said cases, these, our letters patent, and all remedies and advantages whatsoever hereby granted, shall utterly cease, determine, and become void." Now, it is said, that is inconsistent with the Crown having the right to use the invention, because if the Crown has the right to use the invention, why does

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

876

DIXON v. LONDON SMALL ARMS CO.

Grove, J.

the Crown insert this stipulation for a supply? It appears to me perfectly capable, at all events, of being viewed consistently with the right of the Crown to use the patent. It often happens, as we know in the present day, that patentees manufacture their own patented articles, and keep the manufacture entirely in their own hands. If I recollect rightly, it was the case with Mr. Bett's patent capsules. No doubt there are many cases where the patentees keep the matter in their own hands, and by that means they attain a high perfection of manufacture. They license nobody, but only supply the public with the article that they themselves manufacture. They sometimes have a monopoly of materials, as in the paraffine case, by which means they are enabled to manufacture better than any other of her Majesty's subjects, and by the aid of the monopoly granted by the letters patent to purchase the best materials for the purpose of manufacturing that patented article. Thus the Crown may have no means practically, if suddenly called upon, of finding any manufacturer to compete with the patentee for some years after he has by the letters patent monopolised the manufacture of the article. It is necessary that the Crown should have the right to manufacture; and that they should also have the right to compel the patentee to manufacture for them.

Assuming the right of the Crown to use the patent, it does not enable the Crown to punish the patentee because he does not manufacture for the Crown, and, therefore, the letters patent provide that the patentee shall, at the proper price and upon proper terms—nothing being said about paying for licences and so forth—but at the proper price and upon proper terms, manufacture for the Crown. It is said that the patentee may not be able to manufacture. That is a question which we need not inquire into, I suppose if the Crown was to make an impossible demand that would not avoid the patent; but the question is, whether that clause implies that the Crown must be bound by the letters patent. It appears to me that the clause is capable of a perfectly reasonable construction consistent with the Crown having the right to manufacture itself and to use the patented article.

I make no further observations upon *Feather* v. *Reg.* (1),

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

Grove, J.

but I want to make one or two remarks upon the facts of the case, which, assuming the case of *Feather* v. *Reg.* (1) to be good law, render it applicable to the present case. It is said, True, *Feather* v. *Reg.* (1) decides that the Crown may by its servants manufacture the patented articles; but it cannot agree with another person to manufacture them for it, because that becomes a matter of purchase and sale and not a matter of service: I have great difficulty in seeing the distinction. No doubt there are distinctions between servants and contractors in many points of view, as, for instance, as to the responsibility of the master, where he may be liable for the act of his servant whom he has under his control, and not for the act of the contractor, who is an independent man who is contracting to do something for which he is to be paid. But that is not the point here. The question is, admitted that the Crown has the right to manufacture the patented article by other hands than its own—if you can apply the word "hands" to the Crown—can it do so by an independent contractor? Where is the difference between saying to a man, "Come into my service for six months, I will pay you so much a month for manufacturing goods for me," or telling a man, "I want 1000 rifles to be manufactured in six months and I will pay you 1000*l.* for the job"—assuming that 1000*l.* is the profit, or the wages, that a man would get if he was in the employer's service? Is there any difference? In such a case he is equally the servant of the Crown. The difference really seems to be in the mode of payment.

Then comes the question, was this a sale as contradistinguished from an employment? If the defendants here had been persons making arms for the purpose either of general sale to the public, or upon a speculation that the Crown, or the department of the State, being the persons who would be most likely to purchase the articles, would purchase them, it is not necessary to decide the point, but it may be they would have been infringing the patent, because they make them as a manufacture for themselves, upon the speculation of selling them to any person.

This is not a case where a man has manufactured on his own account on speculation, and then afterwards sells to the Crown. In that case he has not been acting under the direction of the

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

DIXON v. LONDON SMALL ARMS CO.

Grove, J.

Crown, but acting as a speculative tradesman. It might, in such a case, be decided that the infringement was complete because he has manufactured and put in practice the patent. But it seems to me that is extremely different from the case here, where there is an order from the Crown to manufacture—for here the Crown supplies the materials, and simply orders the manufacture of an unmanufactured article. It is not necessary to decide what would be the consequence if the Crown ordered these articles without supplying any portion of them and without superintending the manufacture, but ordered persons to mauufacture 1000 rifles for such and such a department. I should be disposed to say that it would be a protected manufacture, because they are things made for and ordered by the Crown, and really done for the Crown. But it is not necessary to decide that point here, because not only are the articles unmanufactured before that period, but the materials for the stocks and barrels are supplied by the Crown. The wood and iron are issued from the government stores. The work is to be superintended by an officer at a place named by the Crown during the process of manufacture, and the patents and specifications are prepared at the Royal Small Arms Factory, at Enfield. Therefore it is distinctly brought under the control of the government. Is not that a manufacture by the Crown just as much as by the contractor? Is there any difference in it because they happen to be paid by the job instead of being paid by the day?

But then it is said that the Crown has the power of rejecting such of the rifles as are not efficiently made, and therefore the property cannot be said to be the Crown's at that time. It seems to me that that amounts to no more than this :—The person manufacturing has, by reason of the order from the Crown, the right, in the first instance, to manufacture the patented article; but he makes the patented article badly, and therefore it is rejected, and it gets back into the possession of the manufacturer. And it is said therefore the manufacturer is an infringer, not for something he afterwards does with those articles which are thrown on his hands, but for something he has done when preparing them for the privileged person. I am unable to see the force of that argument. What would be the position of the defendants if, when those rifles had been rejected by the Crown, the defendants chose to sell them,

1876

DIXON v. LONDON SMALL ARMS CO.

is another question, which I think is quite foreign to the present case.

For these reasons I am entirely of opinion with the rest of the Court, that the judgment of the Queen's Bench should be reversed, and that the judgment should be for the defendants.

Judgment reversed and entered for the defendants.

Solicitors for plaintiff: *Stibbard & Cronshey.*
Solicitor for defendants: *Solicitor, War Department.*

April 10.

SCOTT *v.* THE ROYAL WAX CANDLE COMPANY.

Foreign Corporation Suable in England—Judgment against Foreign Corporation in Default of Appearance—Judgment signed without Leave—Rules of Court, 1875, *Order II., Rule* 4—*Order XI., Rule* 1—*Appendix A., Part. I., Form* 3.

Order XI., Rule 1, of the Rules of Court, 1875, which provides for service of a writ of summons out of the jurisdiction, applies to actions against a foreign corporation resident out of the jurisdiction.

When, in such an action, the plaintiff has issued the writ and served notice thereof by leave of the Court or a judge, he need not obtain any further leave to proceed and sign judgment for default of appearance under Order XIII.

Per Cockburn, C.J., Form 3 of Appendix A., Part I., First Schedule, Rules of Court, 1875, is calculated to mislead a defendant into supposing that such further leave is necessary, and ought to be amended.

THE defendants were a Dutch corporation, with an office at Amsterdam, where they carried on business; they had no office or place of business in England, and were not registered in England. The action was brought to recover damages for breach of a contract to deliver candles. The plaintiff having, under the Rules of Court, 1875, Order II., Rule 4, and Order XI., Rule 1, obtained the leave of a judge at Chambers, issued his writ, and served notice thereof upon the defendants at Amsterdam. The notice was in Form 3 of Appendix A., Part I., which said that in default of appearance the plaintiff "may by leave of the Court or a judge proceed therein, and judgment may be given in your absence." The time mentioned in that notice having expired, and the defendants not having appeared, the plaintiff was proceeding to sign judgment, but some doubt being raised by the officer, the

plaintiff made an ex parte application at Chambers to Quain, J., who, on the 2nd of March, ordered that the plaintiff be at liberty to sign an interlocutory judgment under Order XIII., Rule 6. The plaintiff having accordingly signed judgment,

R. E. Webster, for the defendants, moved to set aside the writ and judgment for irregularity on two grounds: First, Order XI., Rule 1, has not altered the old rule that the Court has no jurisdiction over foreign corporations resident abroad. Under s. 19 of the Common Law Procedure Act, 1852, a person resident out of the jurisdiction might be served, but it was decided that that section did not apply to foreign corporations, though it did apply to foreign subjects: *Ingate* v. *Austrian Lloyd's Co.* (1) There is nothing in the new rules shewing an intention to change that practice, and where no other provision is made the old procedure remains in force: Judicature Act, 1875, s. 21, and the note at the head of the Rules of Court, 1875. Secondly, The notice served on the defendants, which was in Form 3 of Appendix A., Part I., of the Rules of Court, 1875, did not say that the writ had been issued by leave of the Court or a judge, but said that in default of appearance the plaintiff might "by leave of the Court or a judge" proceed, and judgment might be given in the defendant's absence. The plaintiff did not pursue his own notice and obtain leave "to proceed," but signed judgment upon a mere ex parte application, and without notice to the defendants. The old practice was to obtain leave "to proceed" under s. 19 of the Common Law Procedure Act, 1852, and leave is still necessary. Thirdly, If the Court should decide both the above questions in favour of the plaintiff, the defendants seek to have the judgment set aside, and to be allowed to appear and defend. The defendants' solicitors were misled by the notice, and by some communications which induced them to suppose that leave to proceed would be obtained and notice thereof given before any attempt would be made to sign judgment. The affidavit shews this, and that there is a good defence on the merits.

Finlay, for the plaintiff. First, In principle there is no distinction between service out of the jurisdiction on an individual, and

(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

1876

SCOTT v. ROYAL WAX CANDLE CO.

on a corporation. Foreign corporations can sue in England, and why should they not be sued? That they can be sued where they have a place of business and a manager in England was decided in *Newby* v. *Von Oppen*. (1) The only difficulty was where they did not carry on business in England, and, as shewn in *Ingate* v. *Austrian Lloyds Co.* (2), that difficulty was owing to the language of s. 19 of the Common Law Procedure Act, 1852, being inapplicable to corporations. That difficulty is removed by Order XI., Rule 1, the language of which is much larger, and as applicable to corporations as to individuals. The rule begins: "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever" the action or cause of action is of the kinds mentioned, within one or other of which it is not disputed that the present action falls. There are no words in this or any other rule restricting the service to individuals expressly or by implication. Moreover, this rule applies to all the Divisions, and it cannot have been intended to confine the practice in the Probate, Admiralty, and Chancery Divisions to the narrow rule which, under the old practice, prevailed only in the common law courts. The Court of Chancery, under Order X., Rule 7, of the Consolidated Orders, had power to order service out of the jurisdiction on a foreign corporation, and under a previous and similar order exercised that power, in *Lewis* v. *Baldwin* (3), in the case of an Irish corporation having an office in Ireland only. Though the corporation there sought to set aside the service by every means, it was not suggested that the Court of Chancery had not power to order the service. This case is therefore a distinct authority: see 1 Daniell's Chancery Pr. 5th ed. pp. 376, 378, 459, and Morgan's Chancery Pr. 4th ed. p. 425, *Drummond* v. *Drummond* (4), and *Sheehy* v. *Professional Life Assurance Co.* (5) It would be strange if Order XI., Rule 1, was held to take away from the Court of Chancery an existing power. In *Westman* v. *Actiebolaget, &c., Fabrik* (6) the Exchequer Division held that a writ might be issued under

(1) Law Rep. 7 Q. B. 293.
(2) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.
(3) 11 Beav. 153.
(4) Law Rep. 2 Ch. 32.
(5) 3 C. B. (N.S.) 597; 26 L. J. (C.P.) 301.
(6) Weekly Notes, 1876, p. 98.

Order XI., Rule 1, against a foreign corporation resident out of the jurisdiction, and that if they could be served at all (which the Court did not decide) it must be with a notice of the writ, and not the writ itself; and Bramwell and Amphlett, BB., seem to have assumed that the Court of Chancery had the power above mentioned. By Order LXIII.: "'person' shall include a body corporate or politic." Secondly, If leave to proceed and sign judgment be necessary, the plaintiff did in fact obtain it by the order of Quain, J., of the 2nd of March. But it is plain from the new rules that leave is not necessary. Under the Common Law Procedure Act, 1852, the plaintiff issued his writ without leave, but could not sign judgment (in default of appearance) without the leave of the Court or a judge. The present practice is regulated by Order II., Rule 4, and Order XI., Rule 1, which require the plaintiff to obtain leave to issue and serve the writ, or notice of the writ, but no rule requires him to obtain leave to proceed. Form 3 of Appendix A., Part I., was evidently copied from the Common Law Procedure Act, 1852, Schedule A., Form 3.

[COCKBURN, C.J. When a plaintiff has obtained leave to issue the writ and serve the notice under Order II., Rule 4, and Order XI., Rule 1, the rules do not require him to obtain leave to sign judgment; but Form 3, Appendix A., Part I., is calculated to mislead defendants into supposing that a plaintiff must satisfy the Court or a judge before he can sign judgment. That form ought therefore to be amended.]

R. E. Webster, in reply. Foreign corporations have never been sued in this country unless they voluntarily chose to appear, and Order XI., Rule 1, is intended to apply to them if they think proper to appear. This explains the change of language relied on by the plaintiff. *Lewis* v. *Baldwin* (1) has never been considered in text books or elsewhere as deciding that the Court of Chancery could order service on a foreign corporation. It turned on a question of convenience, and the point now raised was not taken, and was therefore not determined. In *Maclaren* v. *Stainton* (2) it is cited by counsel as the case of a corporation coming to or having property in England. The Court of Chancery has

(1) 11 Beav. 153. (2) 16 Beav. at p. 285.

1876

SCOTT v. ROYAL WAX CANDLE CO.

never claimed such a power. *Drummond* v. *Drummond* (1) was not the case of a corporation.

COCKBURN, C.J. Upon the questions raised during the argument as to the power the Court of Chancery may have had before the Judicature Acts to order service of a writ upon a foreign corporation out of its jurisdiction, and whether it had any power beyond that conferred upon it by statute—questions which may be open to some contention—it is not necessary to give any opinion, because I think Order XI., Rule 1, by a short cut avoids all such questions, and gives the Court or a judge power to order service out of the jurisdiction upon any defendant, whether a person or a corporation, in the cases mentioned in that rule. The distinctions made by ss. 18 and 19 of the Common Law Procedure Act, 1852, between service out of the jurisdiction upon a British subject resident abroad, and upon a foreign subject resident abroad, are now done away with. It was held that s. 19, which applied to a foreign subject, did not apply to a foreign corporation which consisted of more than one individual, but the language of Order XI., Rule 1, seems to me large enough to include foreign corporations and to be as applicable to them as to foreign subjects.

Upon the second question, whether it was necessary for the plaintiff, after having obtained leave to issue the writ and serve the notice, also to obtain leave to sign judgment, I expressed my opinion during the argument that it was not necessary; but though the plaintiff was strictly in order in signing judgment, yet since the form of the writ was calculated to mislead the defendants into supposing that the plaintiff could not sign judgment without leave, and to put the defendants into a false position, I think that (having regard to all the circumstances of the case) the judgment ought to be set aside, and the defendants let in to appear and defend the action on payment of the costs thrown away, and the costs of this application.

QUAIN, J. I am of the same opinion. Order XI., Rule 1, applies to all the Divisions, and there is nothing in the language

(1) Law Rep. 2 Ch. 32.

to sanction our making any difference between a foreign subject and a foreign corporation—between a natural person and an artificial person—in respect of service, and there is no reason, in the nature of things, why we should. With regard to s. 19 of the Common Law Procedure Act, 1852, and the decision in *Ingate* v. *Austrian Lloyds Co.* (1) that s. 19 did not apply to a foreign corporation, I should like to have that decision re-considered if it were necessary; but it is not necessary in the view we take of Order XI., Rule 1. *Lewis* v. *Baldwin* (2) is some authority to shew that in Chancery no distinction would be made between service on a foreign subject and on a foreign corporation, because an order having been obtained to serve an Irish corporation, the corporation applied to discharge the order. No objection was made that they were not liable to be served, and the Master of the Rolls consequently treated it as a question of pure convenience, and decided that fifteen of the defendants, who were directors of the corporation, having appeared, the corporation ought also to appear.

POLLOCK, B. I am of the same opinion. If the matter were res nova, the language of Order XI., Rule 1, would be amply sufficient to include foreign corporations as well as individuals, but before giving a decision which makes a great change in the practice, one pauses to see if the legislature has intended the change. When we look at the Common Law Procedure Act, 1852, at the decisions upon s. 19, and at the larger language of the present rules, there is not much difficulty in determining that foreign corporations are within the contemplation of Order XI., Rule 1.

Order that the judgment be set aside, and the defendants be let in to appear and defend upon payment of the costs thrown away and the costs of this motion.

Solicitors for plaintiff: *James, Curtis, & James.*
Solicitors for defendants: *C. C. Ellis & Co.*

(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323. (2) 11 Beav. 153.

4 Jur. N.S. 975.

1876
April 25.

POUSSARD *v.* SPIERS AND POND.

Contract for personal Services—Engagement to perform in a new Opera—Ability to perform on first Night—Condition precedent—Right to rescind.

14 C.L.D. 606
Saff. Cas
414

The plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre, at a weekly salary of 11*l.* for three months, provided the opera ran for that time, commencing on or about the 14th of November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of defendants till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. Plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, defendants' manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a douceur; if she was called on to perform, she was to receive 15*l.* a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendants refused to accept; on which she brought an action for wrongful dismissal. The jury found, inter alia, that the employment of Miss L. by the defendants under the circumstances was reasonable:—

Held, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract.

DECLARATION on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for 83*l.*

A notice of motion was given accordingly, and a cross order was

obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

Feb. 21. *Percy Gye*, for the plaintiff, cited *Cuckson* v. *Stones* (1); *Simpson* v. *Crippin* (2); *Tilley* v. *Thomas.* (3)

Parry, Serjt. (with him *F. H. Lewis*), for the defendants, cited *Bettini* v. *Gye* (4) and *Graves* v. *Legg.* (5)

Cur. adv. vult.

April 25. The judgment of the Court (Blackburn, Quain, and Field, JJ.) was delivered by

BLACKBURN, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my Brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter:—

"Criterion Theatre, Oct. 16th, 1874.

"To Madame Poussard.

"On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:—

"You to play the part of Friquette in Lecocq's opera of Les Pres Saint Gervais, commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (11*l.*), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the manage-

(1) 1 E. & E. 248; 28 L. J. (Q.B.) 25. 5 Jur. N. S. 337.
(2) Law Rep. 8 Q. B. 14.
(3) Law Rep. 3 Ch. Ap. 61.
(4) Ante, p. 183.
(5) 9 Ex. 709; 23 L. J. (Ex.) 228.

1876

POUSSARD v. SPIERS.

ment, and the engagement to be subject to the ordinary rules and regulations of the theatre.

"Ratified: "E. P. Hingston, Manager.

"Spiers & Pond.

"Madame Poussard, 46, Gunter Grove, Chelsea."

The first performance of the piece was announced for Saturday, the 28th of November. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, the 23rd of November, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston had procured, or would procure, a temporary substitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent if there was one.

1876

POUSSARD v. SPIERS.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions.

There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (the 25th of November), the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till the 25th of December, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labour was thrown away, Miss Lewis was to have a douceur for her trouble. If Miss Lewis was called on to perform, she was to be engaged at 15*l.* a week up to the 25th of December, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, the 25th of December. The piece proved a success, and in fact ran for more than three months.

On Thursday, the 4th of December, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On the 2nd of January Madame Poussard left England.

My Brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material

1876

POUSSARD v. SPIERS.

consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And, 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which the jury said "Yes." Lastly, he left the question of damages, which the jury assessed at 83*l*.

On these answers he reserved leave to the plaintiff to move to enter judgment for 83*l*.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

14 C.B. 606

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charterparty in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson* v. *Union Marine Insurance Co.* (1)

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious ill-

(1) Law Rep. 10 C. P. at p. 141.

ness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, shew a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shewn that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favour of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

1876

POUSSARD v. SPIERS.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.

Solicitors for plaintiff: *Lumley & Lumley.*
Solicitors for defendants: *Lewis & Lewis.*

March 6.

RUNNACLES *v.* MESQUITA.

Practice—Writ specially indorsed—Terms as to Defendant being let in to defend—Order III., Rule 6—Order XIV., Rules 1-6.

11 C.L.P. 31
42 L.J.C.P. 285

When a writ is specially indorsed under Order III., Rule 6, if the defendant makes an affidavit under Order XIV., and goes beyond the bare statement that he has a defence on the merits, shewing what the grounds of his defence are, and gives reason for thinking that the defence is substantial, he ought not to be compelled to pay money into court as a condition to his being let in to defend.

THE writ in this action was specially indorsed under Order III., Rule 6, claiming 28*l.* 8*s.* 9*d.*, as a balance on a bill for work done as a builder; and the defendant having appeared, the plaintiff, under Order XIV., Rule 1, called upon him at chambers to shew cause why the plaintiff should not be at liberty to sign final judgment.

The plaintiff's affidavit was as follows:—

1. I am a builder. I was in November last instructed by the defendant to make some alterations and build a shop, and do several other things at the defendant's place, 5, St. Mark's Place, Goodman's Fields.

2. No contract as to price was entered into, the only arrangement being, I was to draw part on account as the work proceeded, and when the whole was finished, send in my bill, which defendant promised he would then pay.

3. I accordingly did the work, defendant paying me on account 98*l.* 11*s.* 3*d.*, being about 75*l.* per cent. on the whole amount, which is customary in my trade.

4. Towards the end of January, when the work was finished, I was with

defendant on the premises, and asked him when it would be convenient for him to receive my account, and he asked me to send him my bill, which I promised to do, adding that if he would like it I was willing for any respectable surveyor to survey and value the work, and accept his valuation as binding on both parties. Defendant said he did not want that, but if I sent in my bill he was ready to settle, or words to that effect.

5. I accordingly sent in my bill as requested by defendant.

6. All the items in the bill are fair and reasonable charges, and all the work charged for in the bill has been done by me or by my direction.

9. A Mr. Allard, who was recommended to me by a friend as a competent surveyor, has gone over the work and measured it, and valued it at 135*l.* 13*s.*, or thereabouts.

10. To the best of my knowledge and belief defendant has no grounds of defence to this action on the merits.

The defendant's affidavit in reply was as follows:—

1. I have read the plaintiff's affidavit in support of an application for leave to sign judgment in this action pursuant to Order XIV., Rule 1.

2. In answer to paragraph 2, it is true that no contract as to price was entered into between myself and the plaintiff, with the exception, however, that the plaintiff guaranteed that the total price for such alterations should not exceed 40*l.* I deny, however, that I agreed, as stated in that paragraph, to pay the plaintiff any sums on account, although I did subsequently pay him sums in respect of such work amounting to 98*l.* 11*s.* 3*d.*

3. Pending the progress of such alterations I frequently remonstrated with the plaintiff upon the additional expense he was putting me to, and requested to know when they would be completed.

4. The account sent in by the plaintiff to me is most excessive and unreasonable, and the amount already paid by me is greatly in excess of the amount the plaintiff is entitled to receive for such work; the same being very badly done, so much so that an outside wall built by the plaintiff will, as I am advised, have to be pulled down and rebuilt.

5. I am advised and believe I have a good defence to this action on the merits, and it is my intention to forthwith instruct a surveyor to survey such work for the purpose of giving evidence on my behalf on the trial of this action.

The master made an order that the defendant be at liberty to defend the action on paying into court within a week 28*l.* 8*s.* 9*d.*, and in default the plaintiff be at liberty to sign judgment.

On appeal, Denman, J., refused to interfere with the order, but directed that, if the money be paid into court within the time limited, the action be referred to the master.

Edward Pollock, on behalf of the defendant, moved to rescind so much of the order of Denman, J., as affirmed the master's

1876

RUNNACLES v. MESQUITA.

order making the payment of 28*l.* 8*s.* 9*d.* into court a condition to the defendant being admitted to defend. He contended that where a defendant shewed at least a good primâ facie case, he ought not to be compelled to advance money as a condition to his being let in to defend.

Bucknill, for the plaintiff, contended that this was a matter entirely in the discretion of the judge, who, by Rule 6 (Order XIV.), may grant leave to defend unconditionally, or subject to such terms as to giving security or otherwise as he may think fit. The Court will not interfere with the exercise of discretion by a judge: *Tomlinson* v. *Goatly* (1); *Villeboisnet* v. *Tobin*. (2)

COCKBURN, C.J. We are agreed that the order of my Brother Denman, in making it a condition to the defendant being let in to defend that he should pay money into court, was going too far. The Court is always very unwilling to interfere with any matter which is in the discretion of a judge at Chambers. But this is a new power, and it is a discretion which must be exercised most scrupulously. This is the commencement of a new system, and of a practice, hitherto only applicable to bills of exchange, superseding the ordinary forms of law where the defendant's liability has to be made out by evidence. And I think we must not hesitate to establish a precedent that, when the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reason for thinking that his defence is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into court as a condition to his being allowed to come in and defend the action. In the present case the defendant does more than state he has a good defence: he makes affidavit that the contract was for a much less sum than what he has already paid the plaintiff; that the work is ill done, and he has paid already more than it is worth; and he is naturally desirous to submit the matter to a jury or a competent tribunal such as an arbitrator, and I think he ought to have this opportunity without being compelled to pay money into court. The order, therefore, of the master, which my Brother Denman has affirmed, was, I think, an order not

(1) Law Rep. 1 C. P. 230. (2) Law Rep. 4 C. P. 184.

within what may be called the proper exercise of the discretion of a judge.

1876

RUNNACLES v. MESQUITA.

ARCHIBALD, J., and POLLOCK, B., concurred.

Order absolute to rescind so much of the order as ordered payment of money into court.

Solicitor for plaintiff: *G. Podmore.*
Solicitor for defendant: *J. M. Green.*

BENECKE AND OTHERS *v.* FROST AND OTHERS.

April 29.

Practice—Order XVI., Rules 18 *and* 21*—Claim by Defendants of Indemnity from third Parties—Citation of third Parties—Directions as to Mode of having Question tried.*

To a claim by plaintiffs for not accepting 183 chests of shellac according to contract, defendants, among other defences, raised the defence that the shellac was not of the quality contracted for. The defendants had contracted with Messrs. R. and Messrs. T. respectively, for the sale to them of 50 chests on the same terms as their contract with plaintiffs, and the defendants cited Messrs. R. and T. under Order XVI., Rule 18. Messrs. R. consented to be bound by the judgment in the action as to the quality of the shellac:—

Held, that Messrs. R. and T. had been properly cited under Order XVI., Rule 18, and the Court directed, under Rule 21, that Messrs. T. should be at liberty to appear and defend the action so far as regarded the question of the quality of the shellac, and that they should be bound by the finding of the jury on that question; and that the question of costs be reserved until after the trial.

CLAIM by plaintiffs against defendants for not accepting 183 chests of shellac according to contract of the 10th of November, 1874, whereby defendants ordered of plaintiffs 183 chests of fine button shellac at 13*l.* 10*s.* cost and freight, per steamer viâ Suez Canal, free from gum and a maximum of three per cent. of resin. Shipment November and December. That plaintiffs bought the shellac, and at defendants' request paid the freight.

Defence, delivered on the 23rd of March, 1876. That defendants bought as brokers for principals, as plaintiffs knew, and defendants are by the custom of the trade not personally liable if they give the name of their principals; that as to part the principals were Rea & Co., and as to the other Thew Brothers. That

1876

BENECKE v. FROST.

defendants did not request plaintiffs to pay the freight for them. That the shellac was not according to quality contracted for, and therefore defendants and their principals respectively refused to accept the different parcels.

Reply, delivered on the 31st of March. Joinder of issue and demurrer.

On the 12th of February, 1876, Messrs. Thew and Rea were respectively served, under Order XVI., Rule 18, with notices that defendants were sued by plaintiffs for non-acceptance of 183 chests of shellac under contracts for the purchase by defendants from plaintiffs. "That defendants claim to be indemnified by you against liability in respect of 50 chests, on the ground that defendants ordered the chests of plaintiffs on your behalf and as your agents."

Messrs. Rea and Thew entered an appearance within the eight days; and application was made to the Court under Rule 21 for directions "as to the mode of having the question in the action determined;" but the Court directed that the statement of defence should be first delivered.

The defence having been delivered, the application was renewed, on an affidavit setting out contracts between the defendants and Messrs. Rea and Thew respectively of the 11th of November, 1874, for the purchase of 50 chests, in similar terms to the contract between the plaintiffs and defendants.

A notice of motion had also been given on the part of Messrs. Thew to set aside the notice to them and their appearance.

Benjamin, Q.C. (with him *A. Charles*), for the defendants. As the contract between the plaintiffs and the defendants is in all essential terms the same as that between the defendants and Messrs. Rea and Thew respectively for 50 chests, the question of quality, at all events, is common and identical between the plaintiffs and the defendants and the defendants and their principals; consequently Messrs. Rea and Thew were rightly cited under Order XVI., Rule 18, and the only question is, what directions the Court will give under Rule 21 as to the mode of having the question determined.

A. Hardy, for Messrs. Rea, consented to be bound by the judg-

ment in the action as to the question of the quality of the shellac.

W. Williams, Q.C. (with him *Patchett*), for Messrs. Thew. It must be admitted that the contract between the defendants and Messrs. Thew for 50 chests is in all essentials identical with that between the plaintiffs and the defendants; but the inferiority of the quality is only one of several defences to the plaintiffs' claim; and it is only where the question between the plaintiffs and defendants and the defendants and third parties is single and identical, that the third parties can be cited under Order XIV., Rule 18. Messrs. Thew had no choice but to appear, and they are not precluded from now contesting the propriety of the notice.

[BLACKBURN, J. If the notice is wrong, no doubt the parties are not precluded by their appearance.]

The defendants have raised a defence quite independent of the quality of the shellac, that they contracted as brokers, and are not liable at all; and it may be that the question of quality will not arise at all. Rule 21 talks of the mode of having *the* question in the action tried; which shews that it is only where there is but one question that third parties can be cited.

[BLACKBURN, J. No doubt questions may arise as to costs which cannot well be provided for beforehand; but the policy of the Act and Rules is to prevent the same question being litigated twice.]

Cohen, Q.C. (with him *H. R. Mansel Jones*), for the plaintiffs. There being several distinct questions in the action, the question of quality may not arise, and it would be very hard to saddle the plaintiffs unnecessarily with additional costs as to the question of quality, which may very possibly become immaterial as between the plaintiffs and defendants; the plaintiffs and defendants ought, therefore, to be allowed to litigate the matter between themselves.

[LUSH, J. Undoubtedly one of the questions in the action is identical as between the plaintiffs and defendants, and as between the defendants and Messrs. Thew; that is precisely the case in which the third parties are to be cited, so that they may be bound by the decision in the action.

1876

BENECKE v. FROST.

BLACKBURN, J. The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries.]

PER CURIAM (Blackburn and Lush, JJ.). It is impossible to provide for the costs à priori; the following will, therefore, be the order of the Court:—It is ordered that Messrs. Thew and Co. be at liberty to appear by counsel and defend this action, as they may be advised, so far as regards the quality of the shellac, but upon no other question; and that they be bound by the finding of the jury upon that question. And it is further ordered that the costs to be ultimately paid to or by Messrs. Thew and Co., and the costs to be ultimately paid to or by Messrs. Rea & Co., also the costs incurred by the plaintiffs in appearing on this motion, be reserved for the decision of a judge after the trial, and subject to appeal to the Court. And it is further ordered that the costs occasioned by the motion of Messrs. Thew & Co. to set aside the notice be the defendants' in any event, as between them and Messrs. Thew & Co.

Order accordingly.

Solicitors for plaintiffs: *Druce, Sons, & Jackson.*

Solicitors for defendants and Messrs. Rea: *Bellamy, Strong, & Burnett.*

Solicitors for Messrs. Thew: *Pattison, Wigg, & Co.*

[IN THE COURT OF APPEAL.]

1876
May 24.

BUSTROS AND OTHERS *v.* WHITE.

Practice—Discovery and Inspection of Documents—Order XXXI., Rule 11—*Discretion of Judge—Only privileged Documents, Communication from Party's Solicitor, or from Agent employed at the Instance of the Solicitor—If Documents submitted to Judge, his Decision final.*

Under Order XXXI., Rule 11, a judge has no discretion as to refusing to allow, at the instance of one party to an action, the production of documents in the possession of another party relating to the matter in question, provided the documents are not privileged; and no document (other than a document of title) is privileged, except a communication from the party's solicitor, or from an agent employed by or at the instance of the solicitor.

Where, by the consent of both parties, the documents in question are submitted to the judge, his decision cannot be questioned in a Court of Appeal.

APPEAL from the order of the Queen's Bench Division, refusing the defendant inspection of certain documents.

The action was for damage to a cargo of cotton seed, of which the plaintiffs were consignees, shipped on board the defendant's ship *Hebe*, from Alexandria to Hull; and the question in the action was whether the damage was caused by bad stowage or by the inherent vice of the seed, owing to its having been shipped in a green state.

An order for discovery having been obtained by the defendant, the plaintiffs scheduled certain documents which, they contended, were privileged, and the defendant not entitled to the production.

The only statement in the affidavit claiming the privilege was, that certain of the documents scheduled, "consist of correspondence between the plaintiffs' firm in Liverpool and their firm abroad, an relate to the condition of the cargo and to the plaintiffs' claim against the defendants, and to the proceedings in the action, and relate only to the plaintiffs' case, and not to the defendant's case."

When the case was before Archibald, J., at chambers, the documents, which were letters to and from Mr. Riso, the plaintiffs' mercantile agent at Hull, and also letters to and from the plaintiffs' firm at Alexandria, were submitted to the judge; and he was of opinion that the defendant was not entitled to the production.

On appeal to the Court, the matter coming on before Quain and Archibald, JJ., was referred to a Court differently constituted;

1876

BUSTROS v. WHITE.

and on the matter coming on before Cockburn, C.J., Lord Coleridge, C.J., and Quain, J., the Court, after perusal of the letters, refused inspection, on the ground that the letters were privileged, Quain, J., however, being of opinion that the letters ought to be produced.

On appeal,

Butt, Q.C. (with him *Maclachlan* and *Graham*), for the defendants. The affidavit of the plaintiffs in support of the privilege is quite inadequate; and on the facts no sufficient affidavit could be made. By the Judicature Acts the distinction in the practice as to discovery and inspection at law and in equity is done away; and the practice is now regulated by Order XXXI., Rule 11. (1)

[JESSEL, M.R. That rule is taken from s. 18 of the Equity Act of 1852 (15 & 16 Vict. c. 86), under which the practice has been regulated for more than twenty years, and the interpretation put upon that section has been, that under it the judge has no discretion in the matter, and that the only documents privileged are professional and quasi-professional communications; and of course documents of title, which latter exception has no application in the present case.]

The Court then called upon

W. Williams, Q.C., and *J. C. Mathew*, for the plaintiffs.

[They admitted that the affidavit filed was insufficient, and the Court desired them to state what facts could be added by a supplemental affidavit, shewing a privilege.]

One, at all events, of the letters, contains the mere opinion only of Mr. Riso, the plaintiffs' mercantile agent at Hull, as to the plaintiffs' case, he having no knowledge of the facts beyond what the defendant himself has.

[JESSEL, M.R. On what ground or principle is the opinion of a non-professional person privileged?]

(1) Order XXXI., Rule 11, in schedule to 38 & 39 Vict. c. 77: "It shall be lawful for the Court or a judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

On the ground of its being a confidential communication which the defendant was not entitled to inspect; similar correspondence was held privileged in *Chartered Bank of India* v. *Rich.* (1)

[MELLISH, L.J. That was not held privileged on the ground of the correspondence containing mere matter of opinion.

JESSEL, M.R. That was under the Common Law Procedure Act, 1854. Blackburn, J., expressly draws the distinction between the practice at law and equity. That distinction is done away, and we must put the same interpretation on Rule 11 of Order XXXI. as has been put on similar terms in s. 18 of the Equity Act of 1852.

LUSH, J. Moreover, s. 25, subs. 11, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), enacts that where there is any conflict between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.]

The letter will clearly not be admissible in evidence, and would be injurious to the plaintiffs' case if made use of before a jury.

[JESSEL, M.R. That a document would not be admissible in evidence was never a ground either at law or equity for not granting inspection.]

The judges retired; on their return the judgment of the Court (Jessel, M.R., Kelly, C.B., James and Mellish, L.JJ., Baggallay, J.A., Lush and Denman, JJ., and Pollock, B.) was delivered by

JESSEL, M.R. This is an appeal from an order of the Queen's Bench Division refusing inspection of certain documents; and it raises a question of very considerable importance as to whether, under the Judicature Act, the judge has any discretionary power of refusing to allow the inspection of documents by a party to the action, except on the ground of privilege; in other words, whether, when the inspection of the document is not precluded by reason of privilege, the judge can exercise any further discretion; and we think he cannot. The rule which governs the practice under the Judicature Acts is the 11th Rule of Order XXXI., which I will not read now, because it has been read during the course of the arguments. It is to be observed that this rule is copied from s. 18

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

1876

BUSTROS v. WHITE.

of 15 & 16 Vict. c. 86, which settled the practice of the Court of Chancery, which obtained from the year 1852 until last year, when the Judicature Act came into force and enacted what should be the practice by which both common law and equity Courts should in future be bound. Now, it was decided soon after the passing of the Act (15 & 16 Vict. c. 86)—and this remained for upwards of twenty years the practice of the Court of Chancery—that s. 18 did not alter the rules of the Court of Chancery as to the right to production of documents, and did not confer any discretionary power on the judges; but the right remained unaffected, and was exercisable at the option of the parties where no privilege could be established. The fact of the rule being copied from the Act of course makes it incumbent upon us to give it the same interpretation as that which had already been fixed by judicial decision upon the terms used; and therefore, even were our opinion different from what it is as to the construction of the rule standing alone, we should not be at liberty to put any other construction upon it than that which had been so long adopted. Besides this, it is to be observed that, under s. 25, subs. 11, of the Act of 1873 (36 & 37 Vict. c. 66), if there is any difference between the practice of the Courts of Law and Equity, the practice of the Courts of Equity is to prevail. And I may also observe that until the coming into operation of the Judicature Act of last year bills of discovery, either in aid of the plaintiff's case in an action at law or in aid of the defendant's case in an action at law, remained available; and though not so often resorted to as they had been before the passing of the Common Law Procedure Act, 1854, were still occasionally used; and the plaintiff or defendant by means of a bill of discovery could have obtained in an action at law all the discovery of the documents which the rules of the Court of Equity could give him; and it therefore lies upon the present plaintiffs to shew something depriving the defendant of that right in one or other of the Judicature Acts. I need not say that nothing of the kind is shewn.

The only point now remaining to be considered is, whether an affidavit could be put in stating sufficient grounds of privilege to exempt any of these letters from production. It was not suggested that they could be all protected, but it was said that

some or one of them might be protected by an affidavit somewhat to this effect: that the letter contained mere matter of opinion volunteered by a non-legal agent, who had no personal knowledge of the facts beyond that possessed by the defendant himself, who was the party applying for the inspection; but I am at a loss to see that that affords any ground whatever for protection. There is nothing in that which brings the matter of opinion within the rules as to professional privilege, or within what is sometimes called quasi-professional privilege, by which I understand this: that, where the advice or communication does not proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or even by the client on his recommendation, or in some way or other procured by a solicitor acting in the case for the plaintiff or defendant, the communication is privileged. But this supposed letter is not within that rule, nor does it appear to fall within any other known rule by which privilege can be claimed; and if it is a matter of right, as we think it is, it is no ground for extending the rule as to privilege to say that the production of the document might be injurious to the party producing it if made use of before a jury.

We are not willing to part with this case without saying a word or two as to the practice which has hitherto prevailed in chambers in cases where affidavits have been produced to the judge which appeared to be defective; and where at the desire of both parties, and with a view of avoiding the delay and expense which might be occasioned by allowing the matter to stand over for the production of a further affidavit, the judge has taken upon himself the trouble and responsibility of looking into the documents and deciding whether they ought to be produced. We do not desire to put a stop to that practice; but we think it should be known that where that practice is adopted it is not competent to either party afterwards to question the decision of the judge in a Court of Appeal. The order for production will be made.

Appeal allowed, and production ordered.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*

Solicitors for defendant: *Stokes, Saunders, & Stokes, for R. Purvis, South Shields.*

1876
Feb. 21.

MEIKLEREID, APPELLANT; WEST, RESPONDENT.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 169—*Allotment of Wages—Liability of registered Owner of Ship—Charterparty equivalent to Demise.*

74 QBD 162-3

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 169, the wife of any seaman, in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorized the drawing of the note.

The appellant was the registered owner of the ship *Sydney Hall*, and entered into a charterparty with H., by which he demised the ship to him for a stipulated period, and parted with all control over it. H. took possession of the ship, and appointed a master, who engaged the respondent's husband as one of the crew, and gave her an allotment note, allotting and requiring the charterer to pay her 6*l.* monthly out of her husband's wages. H. having become insolvent:—

Held, that the section did not, under the circumstances, make the appellant, as registered owner, liable to pay the arrears due under the note.

CASE stated by Sir R. W. Carden, one of the aldermen, and a justice for the city of London.

Upon the hearing of a complaint preferred by the respondent, the wife of H. J. West, a seaman serving on the British ship *Sydney Hall*, and the holder of the allotment note (hereinafter referred to) against the appellant, the owner of the ship, under s. 169 of 17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854 (1)),

(1) By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 169, "the wife, or the father or mother, or the grandfather or grandmother, or any child or grandchild, or any brother or sister of any seaman in whose favour an allotment note of part of the wages of such seaman is made, may, unless the seaman is shewn, in manner hereinafter mentioned, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, and subject, as to the wife, to the provision hereinafter contained, sue for and recover the sums allotted by the note when and as the same are made payable, with costs, from the owner or any agent who has authorized the drawing of the note, either in the county court or in the summary manner in which seamen are by this Act enabled to sue for and recover wages not exceeding 50*l.*; and in any such proceeding it shall be sufficient for the claimant to prove that he or she is the person mentioned in the note, and that the note was given by the owner or by the master, or some other authorized agent; and the seaman shall be presumed to be duly earning his wages, unless the contrary is shewn to the satisfaction of the Court, either by the official statement of the change in the crew caused by his absence, made and signed by the master, as by this Act is required, or by a duly certified copy of some entry in the official log book to the effect

1876

MEIKLEREID v. WEST.

for non-payment of arrears due under such allotment note, the justice (having, by virtue of the statute 11 & 12 Vict. c. 43, s. 34, the authority of two or more justices, as required by the Merchant Shipping Act, 1854), ordered the appellant to pay to the respondent the sum of 18*l.*, being the amount due to her at the time of his adjudication under such allotment, and including the sum of 6*l.* for which the summons originally issued, and 12*l.* which had accrued due since the issuing of the summons, and which the appellant consented to being included in such order.

It appeared that the appellant was, at the date of the signing of the allotment note, and at the time of the adjudication, the sole registered owner of the British ship *Sydney Hall;* that Sarah West was the wife of H. J. West, a seaman, who had entered into articles of agreement to serve on board the ship, and who was then serving on board such ship; and that in the agreement was inserted and allotted to the respondent Sarah West, as his wife, the sum of 6*l.* monthly of his wages; that an allotment note, in the form sanctioned by law, was given to Sarah West, upon which there became due the said sum of 18*l.*, so ordered to be paid.

The following is the material part of the allotment note:—

SEAMAN'S ALLOTMENT NOTE.

Name of Ship.	Official Number.	Now bound on a voyage to
Sydney Hall. No.		Monte Video. Dated at London, this 13th day of Feb. 1875.

"Sanctioned by the Board of Trade, February, 1868, in pursuance of 17 & 18 Vict. c. 104.

"One month after date, pay the sum of 6*l.*, part of the wages of Henry West, engaged to serve as assistant engineer in the

that he has left the ship, or by a credible letter from the master of the ship to the same effect, or by such other evidence, of whatever description, as the Court in its absolute discretion considers sufficient to shew satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid. Provided that the wife of any seaman who deserts her children, or so misconducts herself as to be undeserving of support from her husband, shall thereupon forfeit all right to further payments of any allotment of his wages which has been made in her favour."

1876

MEIKLEREID v. WEST.

above-named ship, to Sarah, his wife (1), and continue to make such payment until duly stopped according to law. (2)

"6*l*. "Wm. Fawens, Master. (3)
"Hy. West, Seaman.
"To "Wm. Powell, Witness.
"W. T. Henley,
"Payable at 110, Fenchurch Street, E.C.
"Supt. Mer. Marine Office.

"(1) Here insert the word wife, sister, or other description of relation, if any. In case of a wife the marriage certificate must be produced, if required, when payment is demanded. (2) Security for repayment, in case of desertion, if required, is to be given by the seaman when this allotment note is granted. (3) If the owner or agent give the note, this must be altered accordingly."

It further appeared that W. T. Henley had chartered the ship from the appellant, the owner, on a time charterparty, of which the following were the material parts:—

"London, 29th October, 1874.

"It is this day mutually agreed between G. B. Meiklereid & Co., owners of the steamship *Sydney Hall*, and W. T. Henley, Esq., of 110, Fenchurch Street, charterer, that the steamer, being tight, staunch, and strong, and in every way fitted for the voyage or service, shall be placed under the directions of the said charterer, or his assigns, not later than the 10th Nov., at his works at North Woolwich, to be by him or them employed for the conveyance of lawful merchandise, or on cable service, between good and safe ports in the United Kingdom and continent of South America (no salt or injurious cargoes to be shipped) as ordered by the charterer, the cargo to be laden in any dock or discharged in any dock the charterer may order, provided the vessel is always afloat.

"The said steamer is let for the sole use of the said charterer, and for his benefit, for the space of three or more calendar months, at charterer's option, commencing from the date the vessel is placed at the disposal of the charterer, at London, as above, he having the whole reach and burden of the vessel; and she is not to be required to load more than she can reasonably stow and carry, over and above her tackle, provisions, and stores, &c.

"The freight for the hire of the said steamer shall be as follows:—At and after the rate of 350*l*. per calendar month, payable

bi-monthly as due, until the vessel is again returned by the charterer, of which seven days' notice in writing is to be given to the owners.

"The coals for the steam engines shall be supplied by and at the cost of the charterer, who shall also pay all port and dock charges, pilotages, delivery, as well as labourage and other duties, &c., also finding all ship's stores, paying crew's wages, repairs of engines and boilers, if required, and necessary stores for the engine room—that is, oil, tallow, and waste, owners paying insurance on the vessel only. . . .

"The owners to have a lien upon the cargo and freight for arrears of hire, and the charterers to have a lien on the ship for the monthly freight paid in advance.

"The vessel to be delivered up to the owners on the termination of this charterparty, at London, in the same good order and condition as when delivered, fair wear and tear excepted. . . .

"Failing the payment of the monthly hire as stipulated, the owners to be at liberty to withdraw the vessel from the service of the charterer, and claim the penalty, with any hire that may be due."

W. T. Henley as such charterer had appointed the captain of the ship, who subsequently engaged the crew thereof and issued the allotment note.

All payments due on the allotment note to Sarah West had been paid by W. T. Henley up to the 13th of May, 1875. The affairs of W. T. Henley were in liquidation.

It was stated on the part of the appellant that the ship was then in the possession of his mortgagees, and that he then had no pecuniary or beneficial interest in the ship, and had not had any interest in her since the month of February, 1875, beyond his interest under the charterparty.

The appellant proved that he never authorized Mr. Henley or anyone else to issue this allotment note on his behalf.

It was contended for the appellant, that although he was the sole registered owner, yet as he had (as was alleged) no beneficial interest in the ship, and had not authorized the issuing of the note, therefore he was not liable as owner to pay such allotment note under s. 169; but that the respondent's remedy was against Henley, the charterer, whose captain had issued the allotment

1876

MEIKLEREID v. WEST.

note, and who it was alleged was now under the said charter-party the "owner," within the meaning of the statute.

The justice overruled these objections, and held, that under s. 169 the respondent was entitled to two remedies, "one enabling her to sue for and recover the sum allotted by the note from the owner," or at her option "from any agent who had authorized the drawing of the note;" it being proved that the appellant was the sole registered owner, and the respondent having elected (the agent who authorized the "drawing of the note" being insolvent) to sue the appellant as such owner, the justice held that the appellant was the only person who could be sued as owner, and that he could not avoid his statutory liability by chartering or mortgaging his vessel to a third party, and he made an order against him accordingly.

The question for the opinion of the Court was, was the appellant the owner within the meaning of s. 169 of the Merchant Shipping Act, and had the respondent a right to recover from him as such owner?

January 15. *A. L. Smith*, for the appellant, cited *Reeve* v. *Davies* (1); *Hibbs* v. *Ross* (2); Maude and Pollock's Law of Merchant Shipping, 3rd ed. p. 296.

Poland, for the respondent, referred to the Merchant Shipping Act, 1854, ss. 44, 169, 181, 182, 188.

The nature of the arguments is stated in the judgment.

Cur. adv. vult.

Feb. 21. The judgment of the Court (Mellor and Field, JJ.,) was delivered by

FIELD, J. This was an appeal from an order of Sir Robert Carden made under the 169th section of the Merchant Shipping Act of 1854, whereby he ordered the appellant to pay to the respondent the sum of 18*l.*, being the amount of three monthly instalments due under an allotment note of the 13th of February, 1875, by which the master of the *Sydney Hall*, and the respondent's husband, Henry West (who was a seaman serving on board), directed Mr. W. T. Henley to pay to the respondent a

(1) 1 Ad. & E. 312. (2) Law Rep. 1 Q. B. 534.

monthly sum of 6*l.*, as part of wages agreed to be paid to her husband for his services.

Upon the facts of the case it appeared that the appellant was the registered owner of the ship *Sydney Hall*, and that in October, 1874 (she then being at Lisbon), he entered into a charterparty with Mr. Henley, to whom the allotment note was directed, for her hire at a lump payment of 350*l.* per month. By the terms of the charter the ship was to be placed under the direction of the charterer, to be employed by him for the conveyance of merchandise or cable service. By another clause of the charter, the steamer was "let for the sole use of the charterer" for three or more calendar months at his option, and he was to pay the stipulated freight until the ship was returned by him; the charterer was further to find all ship's stores, to pay crew's wages, repairs of engines and boilers, &c., the appellant paying his insurance on the vessel only. The vessel was to be delivered up by the charterer to the appellant on the termination of the charter, fair wear and tear excepted. The charterer, having taken possession of the ship under the charter, appointed one Fawens as master, and the latter engaged the respondent's husband as one of the crew. In the articles of agreement entered into between them the sum of 6*l.* monthly of his wages was allotted to the respondent, and the allotment note in question was thereupon given to her, by which the master and the seaman required the charterer to pay to her the allotted sum. The note having been presented to Mr. Henley, he acted upon it, and paid the respondent several of the instalments due under it, but in or after May, 1874, his affairs went into liquidation, and some of the subsequent instalments having fallen into arrear, the respondent commenced summary proceedings under the 169th section against the appellant, as registered owner, to recover the arrears.

Upon the hearing of the summons the magistrate held, in accordance with the contention before him, that the appellant, being the de facto registered owner of the *Sydney Hall*, was liable to the respondent for these instalments; and it is the appeal from that order which we have now to decide. We are of opinion that the order cannot be supported.

Nothing can be clearer than that for the whole amount of

1876

MEIKLEREID v. WEST.

wages, of which these allotted sums formed part, the respondent's husband had no remedy against the appellant. It was not, and could not be, reasonably contended that he, by himself or by any authorized agent, had entered into any contract with the respondent's husband, or given any authority, expressed or implied, for the drawing of the note in question.

The only serious contention upon which his liability was sought to be rested before us was that, inasmuch as he was the de facto registered owner of the *Sydney Hall*, he was "the owner" within the meaning of the 169th section; and it was urged that by that section a special and peculiar right and remedy are given to the wife to sue and recover against the appellant under her husband's contract with the master, although the husband could not himself have recovered as against the appellant. Now, in order to dispose of this question, we must consider what were the respective positions of the appellant and of Mr. Henley, the charterer, and the master, in order to see whether the appellant can be truly said to have been such "owner" within the meaning of the section in question. The object of the section is to enable a seaman, when about to leave home on a voyage, to make provision for his wife during his temporary absence; and the mode by which this is done is by enabling him to set apart in the hands of his employer a portion of the wages which he is earning on board, and to give his wife the power of receiving them. Now, in the present case, although the appellant was in every sense before the execution of the charterparty the "owner" of the ship, he had by the execution of that instrument entirely divested himself not only of the possession of but also of all control over her. The charterparty, as is already stated, contained not only words of demise, which by themselves passed the possession of the ship for the stipulated time to the charterer, but also contained the other stipulations above set out carrying out the same object. The charterer, in fact, appointed the master, and the master so appointed paid the wages as the charterer's agent. The appellant had no control over either the ship, or the master, or the voyage, or the crew. Indeed, his rights in respect of the ship were limited to the bare right to receive the stipulated hire, and to take her back into his possession when the charter should come to an end. The appel-

lant not only made no contract with the respondent's husband, either himself or by any authorized agent, but the articles of agreement are made by the master, and the allotment is, by the express direction of the respondent's husband and the master, directed to the charterer, who acted upon it until his failure. Now, under these circumstances, we cannot think that it was the intention of the legislature to impose a liability upon a shipowner through the contract of third parties, and without any act or contract of his own, merely because he is registered as "owner." The authorities are numerous which point to the distinction between those cases in which the effect of the charter is to retain the ownership in the owner, and those in which he parts with all possession and control, and they are vested in the charterer as temporary owner. Now the present case falls clearly within the latter branch, and we think that the meaning of the word "owner," in the 169th section at least, must be restrained to such actual owner for the time being of the ship as, either himself or by his master or other authorized agent, manages and controls her, and enters into the agreement for the wages of which the allotment note is part.

Mr. Poland was unable to point out any satisfactory reason for the alleged distinction between the rights of the seaman in respect of the wages themselves, and that of his wife in respect of the part to be advanced by means of the allotment note. It was urged before us that, inasmuch as the appellant had the benefit under the charter of his time freight, which could not have been earned without the services of the seaman, it was not unjust to make him liable. It might as well have been said that because a person contracts with and pays a responsible builder for building a house, and the builder omits to pay his joiner or bricklayer, the person contracting has the benefit of their work, and ought to pay them for it. Upon these grounds we come to the conclusion that the appellant is not liable for the arrears of the advance note, and that the order of Sir Robert Carden attempting to make him so must be quashed.

Judgment for the appellant.

Solicitors for appellant: *Ellis & Crossfield.*
Solicitor for respondent: *T. J. Nelson.*

1876
Feb. 1.

PHILLIPS *v.* BARNET.

Husband and Wife—Effect of Divorce—Wife suing Husband after Divorce for Assault during Coverture.

A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture.

Declaration, that the defendant assaulted and beat the plaintiff. Plea, that at the time of the committing of the grievances, &c., the plaintiff was the wife of the defendant. Replication, that before suit the marriage of the plaintiff and the defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial Causes. On demurrer:—

Held, that the replication was bad: for that the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband and wife are one person in law.

DECLARATION, that defendant assaulted and beat plaintiff, by means of which plaintiff became permanently injured in health, and was put to expense for medical and other assistance.

Third plea, that at the time of the committing of the grievances complained of, plaintiff was the wife of defendant.

Replication, that before suit the marriage of plaintiff and defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial causes.

Demurrer and joinder in demurrer.

C. Russell, Q.C. (*G. Browne,* with him), in support of the demurrer. The third plea is good and the replication bad. No action will lie at the suit of a wife against her husband for injuries which he has inflicted upon her during the marriage, and though the marriage be afterwards dissolved, she has no statutory power to sue him for such injuries. It has long been settled that in an action for an assault on the wife, both husband and wife must join: *Westbrooke* v. *Strutville* (1); *Dickenson* v. *Davis* (2); Com. Dig. Baron and Feme (V.); Blackstone's Commentaries, Hargreave's ed., vol. i., p. 444. The Divorce Act, 20 & 21 Vict. c. 85, ss. 25, 26, shews that the effect of a decree for divorce or judicial separation is not retrospective, and in *Midland Ry. Co.* v.

(1) 1 Str. 79. (2) 1 Str. 480.

Pye (1), it was distinctly held that a married woman could not maintain an action for injuries to property before the date of a protection order under s. 21. The disability of the wife arises from the rule that she and her husband are one person in law.

[BLACKBURN, J. It appears, however, to be at least doubtful, whether the non-joinder of the wife is ground for a plea in abatement or in bar.]

The husband cannot be compelled to join, he is dominus litis, and the wife, even though pleas in abatement are abolished, cannot bring such an action as this.

[FIELD, J. In *Wenman* v. *Ashe* (2), Maule, J., says, that for many purposes husband and wife are essentially distinct and different persons.]

The remedy of the wife is under the Divorce Act (20 & 21 Vict. c. 85), s. 32, which provides that the Court may upon a decree order the husband to secure to the wife such sum of money, &c., as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable.

J. Brown, Q.C. (*Beresford*, with him), for the plaintiff. The replication is good. The assault was a legal wrong to the plaintiff which could not be redressed during coverture, because the legal remedy was vested in the defendant and the plaintiff. The dissolution of the marriage has however removed this impediment, and the wife is now entitled to sue, the legal remedy being vested in her alone. It must be conceded that the assault is a wrong, for the right of the wife to obtain articles of the peace is not disputed. But it is said, that it is a wrong without a remedy. But the wife's disability was founded upon nothing but the necessity of joining her husband as plaintiff, a mere difficulty of procedure which no longer exists. Where husband and wife were living apart, and she had a separate maintenance, and he by his violence compelled her to exhibit articles of the peace against him, he was held liable for the expenses as being necessary for her protection: *Turner* v. *Brookes*. (3) And a wife after divorce is entitled for

(1) 10 C. B. (N.S.) 179; 30 L. J. (C.P.) 314.

(2) 13 C. B. 836, 844; 22 L. J. C. P. 190.

(3) 10 A. & E. 47.

1876

PHILLIPS v. BARNET.

her sole benefit to such of her property and effects as were not reduced into possession by her husband during coverture: *Wells* v. *Malbon*. (1) *Capel* v. *Powell* (2), shews that after divorce a man is not liable to be sued jointly with his wife, for a tort committed by her during the coverture. The doctrine that husband and wife are, in law, one person: Co. Litt. 3 a, Story, Equity Jurisprudence, § 1367; is superseded by the statutory divorce, under which the procedure is equitable. With regard to the argument founded on s. 32 of the Divorce Act, the Court, if the husband by beating his wife had disabled her, might perhaps take it into account in awarding alimony; but alimony is not varied by the extent of the husband's delinquency, or with the object of mulcting him as the guilty party: *Hooper* v. *Hooper*. (3)

BLACKBURN, J. I think that this action cannot be maintained. There can be no doubt that if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony or a misdemeanour, as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person. But the question, whether after a divorce a husband can sue his wife, or a wife her husband, for anything which has happened during coverture, depends upon very different considerations. I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person. It is laid down in Co. Litt. 3 a: "A femme covert cannot take anything of the gift of her husband." And in the note to this passage it is said: "Adjudged acc. in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations. 1. Though the husband cannot convey to the wife immediately, yet he may

(1) 31 Beav. 48; 31 L. J. (Ch.) 344. 8 Jur. N.S. 249

(2) 17 C. B. (N.S.) 743; 34 L. J. (C.P.) 168. (3) 30 L. J. (P. M. & A.) 49. 10 Jur. N.S. 1255.

give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use." The note then refers to page 112 a, s. 168: "Though a man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law, yet by such custom he may devise by his testament his tenements to his wife;" and in Coke's comment it is said, "This opinion is clear, for by no conveyance at the common law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her, for the reason that Littleton here yieldeth." Com. Dig. Baron and Feme (D. 1), is to the same effect, and an instance is given, that if a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged.

These authorities shew that the objection to the action is, not because it is one in which husband and wife ought to be joined, but because husband and wife cannot contract with or convey to each other. If the technical objection on the score of parties were the only one, either husband or wife, after the death of the other, might sue the executors for acts done during coverture, and this I imagine has never been done. The reason, therefore, why the wife cannot sue the husband for beating her must be because they are one and the same person, and the same reason exists in criminal law, where a woman cannot be convicted of larceny though she has in fact carried away her husband's goods. Other instances might easily be given, all shewing that the reason is not the technical one of parties, but because, being one person, one cannot sue the other.

Then, does the dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should. It is not difficult to see why such an action has not been brought before. There could be no question of bringing it

1876

PHILLIPS v. BARNET.

except where the marriage was dissolved by a divorce, for if husband or wife died any action would be defeated by the rule actio personalis moritur cum personâ. Before the dissolution of the marriage the objection on account of parties would of itself prevent the action.

The 32nd section of the Divorce Act (20 & 21 Vict. c. 85) which enables the Court in decreeing alimony to take into account the conduct of the parties, in some degree mitigates any hardship in the law, but my decision is without reference to that section, on the ground that there was no cause of action during coverture, and that the dissolution of the marriage does not give one.

LUSH, J. I am of the same opinion, and I agree with Mr. Brown that this is a point of considerable importance, especially since the passing of the Divorce Act. A wife may now obtain a divorce upon proof of adultery and cruelty by the husband. If therefore we decided in favour of the plaintiff, the effect of our decision would be, that every wife who obtained a divorce on the ground of adultery coupled with cruelty could bring an action similar to this. It is agreed on both sides that this is a case of the first impression, and it must therefore be decided on principle, and with reference to the well-known maxims of the law.

Now it is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense. For example, the husband cannot covenant with or make a grant to his wife, and she cannot in law be convicted of stealing his property. And it is laid down that if a husband is together with others charged with a crime, the wife cannot give evidence even against the others. It may be safely laid down, I think, that neither can acquire any civil rights against the other, or apply to any civil court to enforce them. For her personal protection the wife may exhibit articles of the peace against the husband, but, in my opinion, her remedy does not extend to the bringing an action against her husband. It remains to consider what is the effect of a divorce on this disability. Now I cannot

for a moment think that a divorce makes the marriage void ab initio; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the Court in each case.

FIELD, J. I am of the same opinion, though I was not without doubt during the argument; but I now think it clear that the real substantial ground why the wife cannot sue her husband is, not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person. In *Firebrass* v. *Pennant* (1) the Court says: "As this was a provision by a husband for his wife, we should be glad, if possible, to get over the maxim in law, that a husband and wife are one person. . . . We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." Judgment was given in that case for the defendant reluctante totâ curiâ. I agree in that decision, but in this case I give my decision without any reluctance, for I think that we should be establishing a dangerous precedent if we held that this action would lie.

Judgment for the defendant.

Solicitors for plaintiff: *Lewis & Lewis.*

Solicitors for defendant: *Tanqueray-Willaume & Co.*

(1) 2 Wils. at p. 255.

1876
April 12.

[IN THE COURT OF APPEAL.]

MERCIER *v.* COTTON.

9 Ch D 616
13 Ch D 240
23 Ch D 58

Practice—Interrogatories—Time for delivering by Plaintiff—Order XXXI., Rules 1, 5.

Under Order XXXI., Rule 1, the plaintiff may, before the statement of defence has been delivered, deliver interrogatories; but if he does, the interrogatories may be struck out under Rule 5, unless sufficient reasons are given by the plaintiff why the interrogatories are necessary at that stage of the action.

APPEAL from the decision of the Queen's Bench Division, affirming an order of Pollock, B., striking out interrogatories delivered by the plaintiff.

The statement of claim alleged that the defendant, J. R. Cotton, Lord Mayor of London, had caused libellous statements to be printed and published of the plaintiff in the *Times* of the 8th of February, 1876, as follows:—

"Mansion House.—The Right Honourable the Lord Mayor states, in reference to a circular bearing the signature of Captain Mercier, which has been privately issued to the various corporate and other bodies throughout the kingdom, headed 'National Welcome Home to H.R.H. the Prince of Wales,' that the use of his Lordship's name in the concluding paragraph was without his knowledge or consent, and is altogether unwarranted and indefensible."

The statement of claim alleged further that the plaintiff published a letter in answer, and that a paragraph in reply was published by the defendant.

Together with his statement of claim, the plaintiff delivered interrogatories for the examination of the defendant, which related chiefly to the publication of the libel.

The defendant took out a summons at chambers to strike out the interrogatories under Order XXXI., Rule 5. Pollock, B., before whom the summons came, without reading the interrogatories, ordered them to be struck out. The plaintiff appealed, and on the appeal Archibald, J., agreed with Pollock, B. Cockburn, C.J., differed in opinion, and thought that the plaintiff had, under

Rule 1, an absolute right to deliver interrogatories. He, however, concurred in affirming the order of Pollock, B., with a view to having the question settled by the Court of Appeal.

The plaintiff accordingly appealed.

Macrae Moir, for the plaintiff. The plaintiff is, under Order XXXI., Rule 1, entitled as of right to deliver interrogatories with his statement of claim, but a practice has grown up at chambers of striking them out as a matter of course, and without looking at them. This in effect repeals the order, which has the force of a statute. If the interrogatories are unnecessary, the taxing master will, under Rule 2, disallow the costs, and that is a sufficient check to unnecessary interrogatories.

[JAMES, L.J. This is an action for libel, and what can discovery be wanted for? I have looked at these interrogatories, and not one of them is material.]

The plaintiff has an absolute right to deliver interrogatories, and Rule 5 only enables the judge to strike out any which are improper, and not to strike out the whole without looking at them.

A. L. Smith, for the defendant. These interrogatories are altogether unnecessary. They relate only to publication, which the defendant, no doubt, will admit in his statement of defence.

Macrae Moir, in reply.

JAMES, L.J. It appears to me that the order of Pollock, B., was perfectly warranted by Rule 5 of Order XXXI. By Rule 1 the plaintiff "may at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings . . . without any order for that purpose . . . deliver interrogatories in writing for the examination of the opposite party;" but it was not intended by that rule to make the delivery of interrogatories a mere matter of course, so that in every case interrogatories might be delivered by the plaintiff, whether necessary for the purposes of the suit or not. Accordingly, Rule 5 gives to a judge at chambers the widest possible discretion as to striking out interrogatories, though, of course, the discretion is a judicial discretion.

In this particular case, when the matter was before Pollock, B.,

(a) See W.N. (1876) 186.

1876

MERCIER v. COTTON.

he had to inquire of the plaintiff for what purpose he wanted answers to these interrogatories; and if the judge was satisfied that there was no reasonable object in delivering the interrogatories, or that they were not material at that time, he was perfectly justified in striking them out.

This is an action for libel, and in all probability, in his statement of defence, the defendant will admit publication and all the facts. Ought the judge then to allow the interrogatories to be put when it was probable that the whole facts would be admitted in the defence? The Court cannot, in the face of the orders, say that, as an invariable rule, interrogatories may not be delivered before the statement of defence; but if the plaintiff does so deliver them, he puts upon the defendant the onus of applying to have them struck out, and the judge will then require of the plaintiff some reason for wanting the answers. It is very easy for the plaintiff to say what he wants the answers for, and if he does not, the judge may well hold that the interrogatories are not bonâ fide, but are for the purpose of vexation or increasing costs, and he can order the interrogatories to be struck out, without violating the rules made under the statute, or legislating to get rid of the provisions of the rules, but by properly exercising the powers given to him by Rule 5.

No doubt, in nine-tenths of the cases at common law, the plaintiff has no cause whatever, for the purposes of his action, to use the power given him of delivering interrogatories before the statement of defence.

It appears to me, therefore, that the order of Pollock, B., is quite justified.

MELLISH, L.J. I am of the same opinion. The question is, to what extent Rule 1 of Order XXXI. is modified by Rule 5? No doubt Rule 1 was intended so far to alter the law which prevailed under the Common Law Procedure Act, 1854, by which the party had to obtain leave to deliver interrogatories. If the effect of our decision was entirely to deprive the plaintiff of his right to deliver interrogatories, I should think it objectionable; but that is not its effect. The judge may say that at this stage of the pleadings there is no occasion for delivering interrogatories; but the plaintiff

may, after the statement of defence has been delivered, deliver interrogatories, and therefore he is not deprived of his right.

Rule 5 says, in terms, that the interrogatories may be struck out on the ground that they are not "material at that stage of the action." Now, what does that mean? The defendant may say, "I am going to demur, and there is no cause of action." That would be a sufficient reason for not allowing interrogatories. In many cases the interrogatories may not be material at one stage of the action, though they may afterwards become material.

In a large majority of cases at common law it is not possible, until the defence is delivered, to tell whether interrogatories are material, for it would be useless to have interrogatories on matters which would at once be admitted by the defendant. The cases in which they would be allowed are more frequent in equity, where the plaintiff wants an answer in order to know how to amend his claim and to frame his case. These cases very seldom occur at common law, and certainly an action for libel is no exception. The plaintiff wants nothing but the libel itself; and if he has that, he can proceed with his action, and cannot want any answer to interrogatories in order to frame his statement of claim. And if the defendant, in his defence, admits the publication, the interrogatories would be utterly useless.

With regard to the general practice at chambers, it is clear that in the vast majority of cases there is no necessity for interrogatories, and the judge may fairly take it for granted that it is so. There is, therefore, nothing wrong if the judge at chambers should say, "If you have reasons, state them," and should strike the interrogatories out, if, as in nineteen cases out of twenty, there were no reasons to be given.

BAGGALLAY, J.A. I am of the same opinion. I assent to the conclusion that under Rule 1 the plaintiff has a right to deliver interrogatories. But that right is subject to the discretion conferred on the judge at chambers, under Rule 5, of determining whether the interrogatories, or any of them, are to be struck out. The words of Rule 5 are very large, and the illustration of a demurrer put by Lord Justice Mellish is very much to the purpose. Moreover, until the statement of defence is delivered, the plain-

1876

MERCIER v. COTTON.

tiff cannot tell whether the defendant will admit publication, and the expense may be incurred quite needlessly. The judge at chambers may think it not right to have interrogatories delivered until the statement of defence is delivered; for they may not at this stage of the action be material, though they may afterwards become so.

Appeal dismissed with costs.

Solicitor for plaintiff: *F. A. Lewty.*
Solicitors for defendant: *Lewis & Lewis.*

Jan. 29.

[CROWN CASE RESERVED.]

THE QUEEN *v.* CRESSWELL.

Bigamy—First Marriage celebrated elsewhere than in a Church—Presumption that Building was duly licensed.

Upon an indictment for bigamy it was proved that the first marriage was solemnised, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question:—

Held, that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the prisoner was properly convicted of bigamy.

CASE stated by Kelly, C.B.

The prisoner was tried at the last summer assizes at Chelmsford for bigamy and convicted. It was proved that he married one Sarah Hill in 1868, and that she was still alive; and that he married his present wife, the prosecutrix, in October, 1874, at St. Mary, Islington. It was, however, objected for the prisoner that the first marriage was void on the ground that it was solemnised not in a church, but in a chamber at South Weald Hall, in Essex, which was situate some yards from the parish church, and that the marriage took place while the church was under repair. Divine service had been several times performed in the building in question, from which it was for the Court to consider whether the presumption might be raised which would give validity to the marriage. The statutes 4 Geo. 4, c. 76, ss. 21, 22, and 6 Wm. 4,

c. 85, were quoted. The learned judge reserved the point; and the question for the opinion of the Court was, whether upon the above facts this was a valid marriage. If not, the conviction was to be set aside; otherwise affirmed.

No counsel appeared for the prisoner.

C. E. Jones, for the prosecution, was not called upon.

LORD COLERIDGE, C.J. This conviction must be affirmed. The case states that divine service had been several times celebrated in the place where the marriage in question was solemnised. This is sufficient, in accordance with the maxim omnia presumuntur rite esse acta, to give rise to the presumption that the building was licensed. The presumption is the stronger because the clergyman who celebrated the marriage might, by 6 & 7 Wm. 4, c. 85, s. 3, have been indicted for felony if he knowingly did so in an unlicensed place.

MELLOR, LUSH, and GROVE, JJ., and AMPHLETT, B., concurred.

Conviction affirmed.

Solicitor for prosecution: *E. Doyle, for Henry Jones, Colchester.*

[CROWN CASE RESERVED.]

May 20.

THE QUEEN *v.* BERRY.

Deaf Mute—Incapacity to understand Proceedings at Trial for Felony.

A deaf mute being tried for felony, was found guilty, but the jury found also that he was incapable of understanding, and did not understand, the proceedings at the trial:—

Held, that he could not be convicted, but must be detained as a non-sane person during the Queen's pleasure.

CASE stated by the chairman of the Worcestershire quarter sessions.

At the Worcestershire adjourned quarter sessions, held on the 23rd of February, 1876, the prisoner, James Berry, was arraigned for stealing a watch and certain other articles from the person of one Benjamin Smith.

1876

THE QUEEN v. BERRY.

On being called upon to plead to the indictment in the usual manner the prisoner made no reply, and gave no sign of consciousness that he heard or understood the question put to him.

The counsel for the prosecution asked that the chairman should order a plea of not guilty to be entered, and should proceed to try the prisoner. The chairman did not consider that he had any power to adopt this course, and ordered, on the authority of *Rex* v. *Thomas Jones* (1) and *Rex* v. *Elizabeth Steel* (2), that the jury who had been empanelled to try the case should be sworn to try whether the prisoner stood mute of malice or by the visitation of God.

After hearing the evidence of one Robert Knight, who is the brother-in-law of the prisoner, and had known him well from infancy, and who deposed that the prisoner had been deaf and dumb since the age of four years, the jury returned a verdict, "Mute by the visitation of God."

The chairman then ordered that the plea of not guilty should be entered, and that the trial should proceed.

As the said Robert Knight had deposed that he could in some degree communicate with the prisoner by means of signs, the chairman ordered that Robert Knight should be sworn as interpreter in order to convey to the prisoner as far as possible the nature of the proceedings and the evidence against him.

Observing the opinion expressed by Mr. Justice Gould in *Rex* v. *Elizabeth Steel* (2), "that great diligence and circumspection ought to be exercised in so critical a case," and that "it becomes the duty of the Court to inquire touching all these points of which the prisoner might take advantage hereby, to examine all the proceedings against her with a critical eye, and to render her every possible service consistent with the rules of law," and conceiving that his duty in this respect would be best performed by giving the prisoner the assistance of counsel, the chairman accordingly assigned him counsel at the expense of the Court.

After summing up the evidence for the prosecution, which was very clear, the chairman put two questions to the jury: first, whether they found the prisoner guilty or not guilty on the indictment; secondly, whether, in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings.

(1) 1 Lea. C. C. 452 (n.). (2) 1 Lea. C. C. 451.

The verdict of the jury was: "We find the prisoner guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings."

On this verdict, looking to the language used by the judges, as reported in *Steel's Case* (1), and the doubt expressed by Lord Hale, the chairman thought it right to postpone judgment till a case had been submitted to this Court.

The questions for the opinion of the Court were, first, whether, under the circumstances stated above, the prisoner was properly convicted of felony; secondly, if so, whether the court of quarter sessions ought to have passed sentence on the prisoner, or whether it should have ordered him to be detained during Her Majesty's pleasure, or what other, if any, course it ought to have followed.

F. T. Streeten, for the prisoner, was stopped by the Court, who called on

Jelf, for the prosecution. The case is governed by *Steel's Case* (1), in which the judges assembled at Sergeant's Inn held that a prisoner, found by the jury to be mute by the visitation of God, might be arraigned and tried for felony, and, on being found guilty, convicted.

[KELLY, C.B. But here the jury have found also that the prisoner was incapable of understanding what passed at the trial, and can it be contended that he might, under such circumstances, be convicted? The question which ought to have been put to the jury in *Steel's Case* (1) was properly put in the present one.

LUSH, J. Lord Hale says that even if a prisoner, after arraignment and plea, "and before his trial, become of non-sane memory he shall not be tried; or if after his trial he become of non-sane memory, he shall not receive judgment; or if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution: Co. P. C. 4. But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire, ex officio, touching such insanity, and whether it be real or counterfeit": 1 Hale's P. C., p. 35.]

(1) 1 Lea. C. C. 451.

1876

THE QUEEN v. BERRY.

Ought a man who, although capable of distinguishing right from wrong, is too stupid to comprehend legal proceedings, to escape from punishment, or perhaps suffer unduly by being detained, at great cost to the country, for a long time during Her Majesty's pleasure?

KELLY, C.B. This case may be determined both on authority and principle. An authority which has never been overruled or doubted is to be found in *Reg.* v. *Pritchard* (1), where a person, deaf and dumb, was to be tried for a capital felony before Alderson, B., who ordered a jury to be impanelled to try whether he was mute by the visitation of God; the jury found that he was so. The jury were then sworn to try whether he was able to plead, which they found in the affirmative, and the prisoner by a sign pleaded not guilty. The judge then ordered the jury to be sworn to try whether the prisoner was "now sane or not," and on this question directed them to consider whether the prisoner had sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence, to challenge any question he might wish to object to, and to comprehend the details of the evidence; and that if they thought he had not, they should find him not of sane mind. The jury did so, and the judge ordered the prisoner to be detained under 39 & 40 Geo. 3, c. 94, s. 2. That case is directly in point. But there is also another referred to by Alderson, B., in his summing up. It is *Rex* v. *Dyson* (2), where a prisoner indicted for murder stood mute. The jury found her mute by the visitation of God. Parke, B., directed a plea of not guilty to be recorded for her, and the jury to be sworn to try whether she was sane or not. Witnesses were sworn and examined, who proved her incapacity, at that time, to understand the mode of trial, or to conduct her defence. And the learned judge, in charging the jury, and after having read to them the passage from Hales' Pleas of the Crown, referred to by my Brother Lush to-day, told them that, if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane. They did so; and his Lordship ordered her to be kept in strict custody under 39 & 40 Geo. 3, c. 94, s. 2, till his Majesty's pleasure should be known.

(1) 7 C. & P. 303. (2) 7 C. & P. 305 (n.).

Further, I believe it to have been the law from the earliest times, that if it is found at the trial of a prisoner that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial, or order a verdict of not guilty. The jury here have expressly found the prisoner incapable of understanding, and it needs no argument to shew that, under such circumstances, he ought not to be convicted. I remember once trying a foreigner, who knew no word of English, and, there being a doubt as to the efficiency of the interpreter, and whether the prisoner could understand every word of the proceedings, I ordered the jury to be discharged. It would be an outrage to the understanding of a man of common sense, to say that in such a case as the present the prisoner should be convicted. He must be detained during Her Majesty's pleasure.

LUSH, J. I am of the same opinion. If it appears at any time during the trial that the prisoner is of non-sane mind, the proper course is to stop the trial and direct him to be detained during the Queen's pleasure. On that I base my judgment. Such course was adopted in the present case. I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings.

POLLOCK, B., and FIELD and LINDLEY, JJ., concurred.

Streeten suggested that there was no finding of the jury on which the prisoner could be remitted to gaol under the statute.

KELLY, C.B. Yes; for they have actually found that he is not capable of understanding, and has not understood, the nature of the proceedings; which, in point of law, amounts to a finding of insanity.

Conviction quashed, and prisoner ordered to be detained during Her Majesty's pleasure.

Solicitors for prosecution: *White & Sons, for M. Curtler, Worcester.*

Solicitor for prisoner: *W. N. Marcey, Worcester.*

1876
May 20.

[CROWN CASE RESERVED.]

THE QUEEN *v.* BEARDSALL.

Ballot Act, 1872 (35 & 36 *Vict. c.* 33)—*Prosecution for Offences under—Order for Production of Voting Papers—Conditions for Secrecy—Inspection of Papers at Trial—Rules* 40, 41, 64.

A prosecution having been instituted against a deputy-returning officer, who had presided at a booth during a municipal election, for offences under the Ballot Act, 1872 (35 & 36 Vict. c. 33), a county court judge, in the exercise of jurisdiction given by sched. 1, part II., rule 64 of the Act, made an order directing the town clerk of the borough to produce and shew, for the purpose of the prosecution, certain rejected ballot papers, counterfoils, counted ballot papers, and spoilt ballot papers relating to the same polling station, and to open the sealed packets containing those documents, and the marked copy of the register, and to take all such proper means as he should deem necessary in order that the mode in which any particular elector had voted should not be discovered; and further ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Blackburn, J., allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected so as to shew how the votes appeared to have been given:—

Held, that this was rightly done.

Case stated by Blackburn, J.

The prisoner was tried at Manchester on an indictment charging him in thirty-seven different counts with having at a municipal election fraudulently placed seventeen different papers, purporting to be, but to his knowledge not being, ballot papers in the ballot box.

Evidence was given that on the 1st of November, 1875, there was an election for three councillors for the Ward of Heaton Norris, in the borough of Stockport, and that there were six candidates, three of the blue party and three of the red party.

The prisoner was appointed presiding officer at one of the booths, and acted as such, and had the custody of the ballot papers and box. A return from him shewing that he had used 402 ballot papers was proved. At the close of the day he delivered over the ballot box, and a sealed packet containing the marked copy of the register of voters, and the counterfoils of the

ballot papers. After the voters were counted the ballot papers were put in a packet and sealed up. An order of the county court of Cheshire, holden at Stockport was then proved. [A copy accompanied and formed part of the case. (1)] A sealed packet

(1) The order of the county court judge was as follows :—

"The Ballot Act, 1872.

"The Corrupt Practices (Municipal Elections) Act, 1872. In the county court of Cheshire, holden at Stockport, the 25th day of February, 1876.

"In the matter of prosecutions against Joseph Beardsall, for personation and other offences against the Ballot Act, alleged to have been committed by him as presiding officer at the election of town councillors for Heaton Norris Ward, in the borough of Stockport, held on the 1st day of November, 1875.

"Upon hearing Mr. Francis Newton, solicitor on behalf of George Massey, the prosecutor, and the said Joseph Beardsall, and being satisfied by evidence on oath that the inspection and production of the under-mentioned election documents are required for the purpose of instituting or maintaining a prosecution against the said Joseph Beardsall for an offence or offences in relation to ballot papers—it is ordered that Mr. Walter Hyde, the town clerk for the said borough of Stockport do produce and shew for inspection to the said George Massey and his solicitor or agent, on Thursday, the 2nd day of March, 1876, at such hour as the said town clerk shall appoint, and such other days and hours as may be convenient to the said town clerk, at the Court House, in Vernon Street, in the said borough, the under-mentioned documents and papers, and also, after being served with a summons or subpœna for that purpose, to produce and shew the same for inspection at any time or times as may be required under summons or subpœna in any court as evidence for the purpose of maintaining the said prosecutions against the said Joseph Beardsall for the offences aforesaid.

"1. The rejected ballot papers relating to the said election for Heaton Norris Ward.

"2. The counterfoils of the ballot papers marked by the presiding officer in Booth A. to B. relating to the said election.

"3. The counted ballot papers relating to the said election, particularly the ballot papers corresponding to the following numbers written on the said counterfoils [stating certain numbers].

"4. The spoilt ballot papers relating to the same polling station.

"And it is further ordered for the purposes aforesaid, that the said town clerk do cause to be opened the sealed packets containing the said rejected ballot papers, the counterfoils of the ballot papers used at polling station A to B. relating to the said election, the marked copy of the register used in the same polling station, the counted ballot papers, the spoilt ballot papers relating to the same polling station at the said election, and to break any other seal or seals which may be necessary for the purposes aforesaid, and that the said town clerk do by himself or by some person or persons to be by him appointed for that purpose attend on such production and inspection during the whole time thereof. And further, that the said town clerk and such other persons shall take and use all such proper means and precautions as he shall deem necessary in order that the mode in which any particular elector has voted

1876

THE QUEEN v. BEARDSALL.

was produced, and evidence was given, that in obedience to that order the original seals had been broken, and the counterfoils and marked register and the back of the ballot papers had been inspected, and had been again inspected by the magistrate before whom the charge was investigated, and before the grand jury. On each occasion the packets were again sealed up. It was then proposed to open the packet for the purpose of giving the contents in evidence. The counsel for the prisoner objected to this, relying on rules 40, 41, and 64 in the 1st schedule to 35 & 36 Vict. c. 36, as enacting that these documents should not be examined, except in a contested election, and by order of an election tribunal, and that the county court was not acting as an election tribunal when making this order. The learned judge doubted whether this objection was not well founded, but the mischief, if any, having been already done, he resolved to receive the evidence, reserving the point. He requested the counsel for the prosecution to begin with any one case, and the counsel for the defence to raise their objections on it, after which the other cases could be dealt with, subject to the rulings on the first. This was acceded to. The counterfoil numbered 105 was then examined, and appeared on it to have in pencil the number of 116. On reference to the register 116 was found to be the number of James Bancroft, 95, Great Egerton Street, Heaton Norris. It was then proved that James Bancroft died in September, 1875, before this election, and that the deceased was the person on the register.

---

shall not be discovered; and in order that no person see the face of any counted ballot paper, and in order that the said documents and papers so to be produced and inspected shall be safely kept from loss, damage, or other matter or thing whereby the same, or any of them, shall be injured, prejudiced, or altered in any way.

"It is further ordered that the town clerk shall immediately after each such production and inspection return the said documents to their packets and reseal the same.

"It is further ordered that the persons entitled to be present at the said inspection are the town clerk and his assistants, the said George Massey and his solicitor or agent, and the said Joseph Beardsall and his solicitor or agent, and the worshipful the mayor of Stockport, or, in his absence, the deputy mayor of Stockport.

"It is lastly ordered that no person shall be allowed to see the face of any counted ballot paper.

"A copy of this order shall be served on the said Joseph Beardsall, or his solicitor, and on the town clerk."

1876

THE QUEEN v. BEARDSALL.

The voting paper bearing the number 105 printed on it and marked with the official mark on each side was then produced out of the heap. It was folded up, and the counsel for the prosecution requested that it might be opened so as to ascertain for what candidates the votes on this paper were given. To this the counsel for the prisoner objected, relying on the latter part of rule 41. The learned judge thought that, it being proved to his satisfaction that the voter 116 on the register did not vote at all, and that the voting paper was a fabrication, the paper might be opened. It was so, and it proved that the three votes were given for the three blue candidates. The prosecution then, in similar manner, proved that fifteen of the other papers were in respect of counterfoils, on three of which were the number in the registry 334, on two the number 102, and on ten different other numbers.

No one of the twelve persons registered voted at this booth, and the votes purporting to be given on these papers were in each case for the three blue candidates.

The marked register had the names of all these persons scored through, as if each of the voters (or some one believed to be the man) had applied for and obtained the papers.

The prosecution were unable to prove that the person entitled to vote by the 17th paper in the indictment did not do so, so that sixteen cases only were proved.

Evidence was then given by the red personating agent, who produced his copy of the register on which he had marked the names as they were called over.

He had marked in all 382, instead of, as the prisoner's return shewed, 402, and no one of the names of the fourteen names of the voters whose numbers were on the seventeen counterfoils was on his list struck through, and no one had in his presence asked in the name of any one of them for a voting paper.

He was absent for a few minutes once or twice, and it was admitted that the three persons, who in addition to the seventeen made the twenty whose names were marked on the defendants' register and not on his, had in fact voted, but it was very improbable that as many as sixteen votes could have escaped his notice.

The blue personating agent was not called on either side.

1876

THE QUEEN v. BEARDSALL.

Some evidence was given that the prisoner was a blue.

On this evidence the jury found that the prisoner had guilty knowledge that the papers were not asked for by the voters, and that he fraudulently issued them with the intent that they should be placed in the ballot box as they were.

On this the learned judge entered the verdict of guilty on thirty-two of the thirty-five counts, but respited sentence and admitted the prisoner to bail.

The verdict was in the opinion of the learned judge right on the evidence admitted. But if the counterfoils had not been inspected there would not have been any evidence against the prisoner; and if the ballot papers had not been opened so as to shew that all the false votes were on one side the evidence would not have been so strong, and the verdict might have been different.

The questions for the Court were—

1. Was it wrong, under the circumstances, to allow the counterfoils and marked register to be given in evidence?

2. Was it wrong, under the circumstances, to allow the face of the voting papers to be inspected so as to shew the votes purported to be given?

3. Ought the conviction to be quashed on both or either grounds?

Ambrose, Q.C., for the prisoner. The county court judge had no power to make such an order as he did in this case unless a municipal election were in question.

[LUSH, J. Then the legislature have made offences punishable under s. 3, and prevented proof of them?]

No, but have preferred secrecy of voting to the prosecution o election misdeeds.

[KELLY, C.B. Why might not my Brother Blackburn open the papers at the trial?]

Because of the express prohibition in rule 41 that no person shall do so except by order of the House of Commons or an election tribunal.

[KELLY, C.B. Could not the House of Commons order it?]

Not for the mere purposes of a prosecution, for the power is only

given to them when dealing with questions of election, as the proviso in Rule 41 shews. (1)

Where jurisdiction is intended to be given to the criminal or other courts over the papers the Act confers it in distinct terms, as in rule 40, which deals with rejected ballot papers. Rule 64 only enables the county court to make an order in respect of ballot papers. The carefully devised provisions for secrecy of voting contained in the Act would be useless if, on every prosecution or attempted prosecution, these papers could be looked at. Discovery could always be obtained by the simple expedient of taking proceedings against some supposed offender under the Act. The power of the county court judge would appear, from rule 64, to be but ancillary to that of the election tribunal, and he could only make an order for the purposes of such a court. Moreover, even if the order were valid it has been disregarded, for it expressly declared that no person should be allowed to see the face of any counted ballot papers.

[KELLY, C.B. Can you contend that such prohibition applied to my Brother Blackburn ?]

It is absolute enough in terms to do so.

(1) By 35 & 36 Vict. c. 33, sched. 1, rule 37, the returning officer shall seal up in separate papers the counted and rejected ballot papers; and by s. 38 shall forward them to the Clerk of the Crown in Chancery, who, by s. 39, shall retain them for a year.

And rule 40 enacts that "No person shall be allowed to inspect any rejected ballot papers in the custody of the Clerk of the Crown in Chancery, except under the order of the House of Commons or under the order of one of Her Majesty's superior courts, to be granted by such Court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return . . ."

Rule 41: "No person shall, except by order of the House of Commons, or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has once been sealed up, or be allowed to inspect any counted ballot papers in the custody of the Clerk of the Crown in Chancery, such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient; provided that on making or carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid."

1876

THE QUEEN v. BEARDSALL.

C. Russell, Q.C., and *Wright*, for the Crown, were not required to argue.

KELLY, C.B. This case is clear. The legislature has no doubt provided that secrecy shall be preserved with respect to ballot papers and all documents connected with what is now made a secret mode of election. But this secrecy is subject to a condition essential to the due administration of justice and the prevention of fraud, forgery, and other illegal acts affecting the purity and legality of elections. Rule 41 (1) of the Act is certainly expressed in absolute terms which will doubtless be observed by any competent authority to whom an order made under them may be directed. It provides that the papers shall be kept secret, that is, so far as may be possible consistently with the object of the order. By Rule 64 (*b*) of Part II. (2), containing rules for municipal elections, an order of the county court having jurisdiction in the borough . . . shall be substituted for an order of the House of Commons or of a superior court. And the county court judge here made an order in strict pursuance of the terms of the rule and for the purposes of justice, in order to cause a prosecution to be instituted and carried on under this very Ballot Act. I therefore fail to see why the order is not legal. Of course, when the documents were opened every care would be taken to keep the information therein contained as to the voting secret. We are not called upon to determine whether, if no order had been made, and by accident these documents had been in Court, it would not have been

(1) Ante, p. 457, n.

(2) Part II. Rules for Municipal Elections, rule 64 :—

(*b.*) All ballot papers and other documents which, in the case of a parliamentary election, are forwarded to the Clerk of the Crown in Chancery, shall be delivered to the town clerk of the municipal borough in which the election is held, and shall be kept by him among the records of the borough; and the provisions of Part I. of this schedule with respect to the inspection, production, and destruction of such ballot papers and documents, and to the copies of such documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk, with these modifications, namely:

(*a.*) An order of the county court having jurisdiction in the borough or any part thereof, or of any tribunal in which a municipal election is questioned, shall be substituted for an order of the House of Commons, or of one of Her Majesty's superior courts; but an appeal from such county court may be had in like manner as in other cases in such county court.

competent to the learned judge to look at them, nor do we decide that point, as it is unnecessary to do so. But we think that the order of the county court, being perfectly within the terms of the Act, was valid, and that the documents taken out of the packets and produced under it during the trial of an indictment against the prisoner for an offence against the Ballot Act, were properly admissible in evidence.

LUSH, J. I am of the same opinion. It was argued that secrecy was the only object of the Ballot Act; but I do not agree to the proposition. Secrecy was one object, the other was to secure purity of election; and it is difficult to say which is most important. Therefore we find, as might be expected, certain fraudulent acts defined by s. 3, and punishable as misdemeanors, which would seriously interfere with either, viz. forging or fraudulently defacing or destroying nomination or ballot papers, supplying, or putting into the ballot box any ballot papers, &c. Now one would expect to find some security provided against the disclosure of the papers, but, on the other hand, some means by which the crimes enumerated should be proved, and some of those crimes it would be impossible to prove without opening the papers. Such was the case here. Both objects seem to be secured by rules 40 and 41, in both of which the power of the House of Commons is without restriction. Rule 40 enacts that no person shall be allowed to inspect any rejected ballot papers without an order of the House or of one of the superior courts, to be granted by such court on being satisfied that the inspection is required for a prosecution, &c., the rule differing from rule 41 in this respect, viz. that by the first power is given to any superior court, but only for a limited purpose, viz. that of a prosecution for an offence in relation to ballot papers, while no such restriction is placed on the House of Commons. Then in rule 41 there is a proviso placing both the House and the tribunals under restrictions.

With respect to municipal elections the county court judge is put into the place of the House of Commons, and must exercise his discretion, and he has done so here. It seems to me to have been quite within the contemplation of the Act that this order should be made under the circumstances which existed here. The county court judge must have been satisfied of the necessity for it, and

1876

THE QUEEN v. BEARDSALL.

the event proved him to have been right. Then having been once made by the county court judge, I should say the necessary implication, from the fact of the statute having created certain offences and provided for the making of an order in aid of the prosecution, would be that the papers might be opened, but under certain safeguards, which the county court judge has in the proper exercise of his discretion placed around the inspection.

POLLOCK, B. I am of the same opinion.

FIELD, J. I, too, concur. The danger of a county court judge acting improperly is counteracted by an appeal to the superior court.

LINDLEY, J. I agree. If we were to construe the order of the county court judge as Mr. Ambrose suggested, it would defeat the purposes for which the order was made, viz. that the offences might be proved. The order further says that the papers shall not be shewn, but the rational construction is that the documents must be produced at the trial, but, except for the purposes of the trial, must not be disclosed.

Conviction affirmed.

Solicitors for prosecution: *Hopwood & Sons.*

Solicitors for prisoner: *Le Riche & Son, for Cobbett & Co., Manchester.*

Jan. 19; *May* 1, 2.

[IN THE COURT OF APPEAL.]

RAWLEY *v.* RAWLEY.

*Infant—Ratification of Contract after full Age—*9 *Geo.* 4, *c.* 14, *s.* 5*—Set-off—*2 *Geo.* 2, *c.* 22, *s.* 13.

5 Ch D 684

Upon the true construction of 2 Geo. 2, c. 22, s. 13, and 9 Geo. 4, c. 14, s. 5, a set-off cannot be maintained of a debt, contracted by the plaintiff during infancy and not ratified by him in writing after full age.

DECLARATION for money lent by plaintiff to defendant.

Plea, inter alia, set-off on a promissory note of the plaintiff, and for money lent, &c., by defendant to plaintiff.

Replication, that the plaintiff was an infant at the time of making the note and contracting the alleged debt.

1876

RAWLEY v. RAWLEY.

Rejoinder, that plaintiff, after he became of full age, and before action, ratified the promise and contract. Issue joined.

At the trial before Field, J., at the Middlesex sittings, 1875, the plaintiff proved his debt, and the defendant proved a set-off on a promissory note of the plaintiff, for money lent to him by defendant, to a larger amount, but it was admitted that the plaintiff was an infant at the time he contracted the debt and made the note, and only a verbal ratification after he came of age was proved.

The learned judge directed judgment to be entered for the defendant, with leave to move to enter a verdict for the plaintiff for 44*l.* 17*s.* 3*d.*, the amount of his debt.

Notice of motion was given accordingly, on the ground that the ratification of the plaintiff, not being in writing and signed by him, was ineffectual and void at law; and no legal ratification was proved.

Q. B. D.

Jan. 19. *F. Turner*, for the defendant. Lord Tenterden's Act (9 Geo. 4, c. 14, s. 5) (1), which enacts that no action shall be maintained upon a ratification not in writing of a contract made during infancy, does not extend to set-off.

[FIELD, J. *Leroux* v. *Brown* (2), upon the words of the 4th section of the Statute of Frauds (29 Car. 2, c. 3), "no action shall be brought," makes in the defendant's favour, but that case has not been altogether approved.]

Similar words in the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), s. 37, "No attorney or solicitor shall commence or maintain an action or suit" for his fees until one month after the delivery of a signed bill, have been held not to extend beyond an action and suit: *Harrison* v. *Turner* (3), *Brown* v. *Tibbits* (4), the latter of which cases expressly decides that such fees may be set-off

(1) 9 Geo. 4, c. 14, s. 5: "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

(2) 12 C. B. 801; 22 L. J. (C.P.) 1.

(3) 10 Q. B. 482; 16 L. J. (Q.B.) 295.

(4) 11 C. B. (N.S.) 855; 31 L. J. (C.P.) 206.

1876

RAWLEY v. RAWLEY.

notwithstanding the want of a signed bill. The words of the Statute of Limitations (21 Jac. 1, c. 16), s. 3, "All actions" of certain classes "shall be commenced" within certain specified times, have been similarly construed in the latest case upon the subject: *Gee* v. *Liddell.* (1) [He also referred to *Townshend* v. *Stangroom.* (2)]

R. T. Reid (*Sim* with him), for the plaintiff. There would be inequality between a plaintiff and a defendant if a debt not actionable could be set-off; and the Statutes of Set-off (2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5) mean, by "debts," actionable debts. That is laid down, as already decided, in *Francis* v. *Dodsworth* (3), and is established by that case and *Remington* v. *Stevens* (4), *Chapple* v. *Durston* (5), *Walker* v. *Clements.* (6) The law is laid down to the same effect in Buller's N. P. 180. The case of *Gee* v. *Liddell* (1) did not turn upon the Statute of Limitations as supposed in the argument of the other side, nor upon the Statutes of Set-off. When a statute says "No action shall be brought," any proceeding by which a debt may be enforced through the courts of law is included: *Banks* v. *Crossland.* (7) The decisions on the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), *Harrison* v. *Turner* (8), and *Brown* v. *Tibbetts* (9), are not in point, the policy of that enactment, as of the earlier enactments referred to in *Lester* v. *Lazarus* (10), being to prevent attorneys from bringing oppressive actions, whilst the policy of the enactment, the effect of which, in connection with set-off, is in question in this case, Lord Tenterden's Act (9 Geo. 4, c. 14, s. 5), is, as shewn by the preamble to the Act, to require satisfactory evidence. And *Brown* v. *Tibbits* (9), the only one of those two cases directly raising the question of set-off, was decided in compliance with the settled understanding of the profession rather than with regard to the strict construction of the statutes. *Spears* v. *Hartly* (11) and other cases holding that the Statutes of Limita-

(1) 35 Beav. 629.
(2) 6 Ves. 328.
(3) 4 C. B. at p. 220; 17 L. J. (C.P.) at p. 187.
(4) 2 Str. 1271.
(5) 1 C. & J. 1.
(6) 15 Q. B. 1046.
(7) Law Rep. 10 Q. B. 97.
(8) 10 Q. B. 482; 16 L. J. (Q.B.) 295.
(9) 11 C. B. (N.S.) 855; 31 L. J. (C.P.) 206.
(10) 2 C. M. & R. 665.
(11) 3 Esp. 81.

1876

RAWLEY v. RAWLEY.

tions and similar enactments affect only the remedy for the debt, and not the debt itself, are perfectly consistent with the cases already cited upon set-off.

[FIELD, J., referred to the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, s. 2. (1)]

Even if the plaintiff could otherwise avail himself of that Act, he cannot do so, as it applies only to ratifications after the passing of the Act.

Judgments, Q. B. D.

COCKBURN, C.J. I am of opinion that this rule should be made absolute. The question which we have to decide arises upon a plea of set-off, followed by a replication of infancy, and a rejoinder of ratification after full age. The right of set-off depends, I think, upon there being an actionable debt. The statute, no doubt, speaks of "debt," but that, unless a very narrow construction be adopted, means actionable debt. The 9 Geo. 4, c. 14, s. 5, in saying that "no action" shall be maintained upon a ratification without writing of an infant's debt or contract, uses substantially the same language as the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, and others, which say that "all actions" of certain kinds are to be commenced within certain specified times; and it has been held in *Remington* v. *Stevens* (2), that the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, may be replied to a plea of set-off: there is therefore quite sufficient authority for holding, and for applying to the present case, the view that the Statute of Set-off in speaking of a "debt" means an actionable debt. No doubt the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), in saying that no attorney or solicitor shall "commence or maintain an action or suit" for his fees until one month after the delivery of a signed bill, uses language similar to that of 9 Geo. 4, c. 14, s. 5; and it has been held in *Brown* v. *Tibbets* (3), that an attorney or solicitor may set off his fees, notwithstanding the want of a signed bill; but that decision, although it must govern cases upon 6 & 7

(1) 37 & 38 Vict. c. 62, s. 2: "No action shall be brought. . . . upon any promise made after full age to pay any debt contracted during infancy . . . whether there shall or shall not be any new consideration for such promise. . . . ."

(2) 2 Str. 1271.

(3) 11 C. B. (N.S.) 855; 31 L. J. (C.P.) 206.

1876

RAWLEY v. RAWLEY.

Vict. c. 73, s. 37, unless it should hereafter be overruled by higher authority, ought not, I think, to be treated as governing the present case, upon which we have, as I have said, the closer authority of *Remington* v. *Stevens* (1), followed in *Francis* v. *Dodsworth* (2); and it is perhaps to be explained on the ground of the peculiar relation between a solicitor and his client, though I myself doubt whether it was rightly decided. As to *Gee* v. *Liddell* (3), it was not decided upon the Statute of Limitations, or the Statute of Set-off, but upon quite different grounds.

MELLOR, J. I am not so clearly of opinion that this rule should be made absolute as my Lord and my Brother Field are. The 9 Geo. 4, c. 14, s. 5, says, "no action shall be maintained," and I at first thought that "action" could not be extended to set-off; but Mr. Reid's argument has shaken my view; and, as to *Gee* v. *Liddell* (3), he has pointed out that it did not turn upon the Statute of Limitations on which, in the argument of his opponent, it was supposed to turn, and I therefore do not dissent.

FIELD, J. I am of opinion that the rule must be made absolute. The action was brought for money lent. The defendant pleaded a set-off of a promissory note. The plaintiff replied infancy at the time of making the note. The defendant rejoined ratification after full age. The question was thereupon raised at the trial whether ratification without writing was sufficient with reference to the plea of set-off; and that is the question which we have to determine. Decisions upon the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37, have been cited on the part of the defendant, but the policy of Lord Tenterden's Act, 9 Geo. 4, c. 14, with sect. 5 of which we have to deal, was different, its policy being to get rid of disputes as to whether certain acknowledgments, ratifications, and other acts, had really taken place. The preamble of the Act, no doubt, refers only to the Statute of Limitations; but section 5, enacting that no action should be brought upon a ratification after full age of an infant's debt or contract, unless the ratification was in writing, must have had the same

(1) 2 Str. 1271.

(2) 4 C. B. 202; 17 L. J. (C.P.) 185.

(3) 35 Beav. 629.

1876

RAWLEY v. RAWLEY.

policy. Therefore I think that the word "action" in this section may properly be held to have a larger meaning than the every-day legal meaning of the word, and I do not see, on the other hand, any reason for putting a narrower construction upon it. Then is there authority for attaching the larger meaning? The language of the Statute of Set-off, though it says only "debt," has been held by a long series of decisions to mean actionable debt.

Judgment for the plaintiff.

C. A.

On appeal,

May 1 and 2. *F. Turner*, for defendant, urged the same arguments as in the Court below. In addition to the cases there cited, he referred to *Williams* v. *Moore* (1) and *Maddon* v. *White* (2) as to contracts and ratification by infants; and *Philpott* v. *St. George's Hospital* (3), that the language of a statute ought to be taken in its plain and ordinary sense, and not interpreted by the supposed policy of the Act. He also referred to s. 4 of 9 Geo. 4, c. 14 (4), and argued that the position of the enactment shewed that the remainder of the Act was not intended to apply to set-off.

Philbrick, *Q.C.*, and *R. T. Reid*, for the plaintiff, were not heard.

Judgments, C. A.

JESSEL, M.R. The question is a simple question of law, whether, when in an action for a debt the defendant pleads a set-off, to which there is a replication that the plaintiff was an infant when he contracted the debt, and a rejoinder of confirmation of the debt by the plaintiff after he came of age, and this confirmation is not in writing, the plaintiff can have the benefit of s. 5 of Lord Tenterden's Act (9 Geo. 4, c. 14).

It is said for the defendant that, though the debt by the force of Lord Tenterden's Act could not have been made the subject of

(1) 11 M. & W. 256.
(2) 2 T. R. 159.
(3) 6 H. L. C. 338.
(4) 9 Geo. 4, c. 14, s. 4: "The said recited Acts [21 Jac. 1, c. 16, and 10 Car. 1, sess. 2, c. 6, the English and Irish Statutes of Limitations] and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

1876

RAWLEY v. RAWLEY.

an action, yet the statute does not apply to the debt when it is the subject-matter of set-off. To this there seem to me to be several distinct answers. First, when we look to the object of the statute, as stated in the title, which is "An Act for making a written memorandum necessary to the validity of certain promises and engagements," there is nothing to limit its operation to an action; and when s. 5 says that no action shall be maintained on a debt contracted or promise made during infancy, unless ratified in writing after coming of age, it would be a most singular result if the Courts were to hold that this did not apply to set-off, and so in effect were to say, though no action could be maintained upon the promise, yet that the promise was still valid if set up by the same person by way of set-off in an action in which he is defendant. But it is to be observed that set-off is founded on statute, and the only meaning of the Act was to prevent cross actions, and it was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held, that a set-off can only be successfully pleaded when an action could have been maintained for the same debt. And if this is so, the position of the defendant, founded on the particular wording of the section, is not maintainable. Secondly, the terms used in s. 5, "no action shall be maintained," are not so different from those of s. 13 of the Statute of Limitations (21 Jac. 1, c. 16), "all actions shall be commenced and sued within the times hereafter expressed," viz. actions of debt on simple contract &c., within six years after the cause of action; and, though the words are "no action shall be commenced," yet it has been held that the statute could be replied by the plaintiff to a plea of set-off, although no action had been commenced; the Courts, in fact, held that a plea of set-off was equivalent to a cross action. To this it may be added that s. 4, which says that this Act and the recited Acts shall apply to debts alleged by way of set-off, if not conclusive, very much strengthens this construction. Thirdly, a literal construction of an Act always follows when such a construction is clearly in accordance with the general intention of the Act. Now s. 4 says the recited Acts and this Act shall apply to set-off. In applying this Act, therefore, to set-off, we are literally applying

the words of s. 4 in the general terms in which they are used, that is, interpreting "this Act" to mean "the whole of this Act."

On these grounds I am of opinion that the judgment must be affirmed.

KELLY, C.B. It appears to me that the judgment ought to be affirmed on two, at least, of the grounds given by the Master of the Rolls. First, on the words of the Act: s. 5 says no action shall be maintained on a promise by an infant, unless ratified in writing after he comes of age; it does not say that such a promise shall have no legal effect whatever, but it certainly amounts to saying that such an unratified promise or debt shall be a debt or promise which cannot be enforced. Now, the words of the Statutes of Set-off are, that where there are mutual debts between the plaintiff and defendant one may be set off against the other. But are these mutual debts here, when one of them is a debt for which an action cannot be brought? Clearly, in my opinion, they are not. Secondly, s. 4 of Lord Tenterden's Act (9 Geo. 4, c. 14) says that "the recited Acts and this Act shall be deemed and taken to apply to any debt on simple contract alleged by way of set-off by the defendant." That primâ facie means the whole Act, and if so, then s. 5 applies to set-off, and this is conclusive in favour of the plaintiff. I should have been inclined to affirm the judgment on this ground alone; but as there are other valid grounds I prefer relying on them also. A case has been cited before the late Master of the Rolls (1); it is scarcely intelligible, and possibly it may have been decided on valid grounds; but, if it is in point, at all events there are stronger authorities the other way. The cases as to attorneys' bills proceed on quite different grounds, the statute has no relation to the debt, but simply to what must be done before there shall be a right of action.

MELLISH, L.J. I am of the same opinion. The proper construction to be put upon the Statute of Set-off (2 Geo. 2, c. 22, s. 13) is thus noticed in the judgment of Wilde, C.J., in *Francis* v. *Dodsworth* (2): "The judicial construction of this section has been,

(1) *Gee* v. *Liddell*, 35 Beav. 629.
(2) 4 C. B. at p. 220; 17 L. J. (C.P.) at p. 187.

1876

RAWLEY v. RAWLEY.

that no debts can be used by way of set-off except such as are recoverable by action; and it has accordingly been held that the Statute of Limitations may be replied to a plea of set-off." Consequently, when Lord Tenterden's Act says that no action shall be maintained on a debt or promise made by an infant, unless ratified in writing by him when of full age, it necessarily follows that whenever no action could be maintained for the debt the debt cannot be set-off. It is said that there are decisions the other way; those most relied upon are confined to the cases as to set-off of attorneys' bills. But the only effect of the statute, which requires a signed bill to have been delivered before an attorney brings an action on the bill, is to postpone the remedy by action; and it leaves untouched the other remedies, which remain as before, such as set-off. But the effect of s. 5 of Lord Tenterden's Act is not to postpone the bringing of an action until the plaintiff has done something, but the plaintiff cannot sue at all unless the infant has chosen to ratify his debt in writing after he came of full age; the consequence is, that a debt ratified verbally is exactly the same as if it had not been ratified at all. On the other grounds mentioned by the Master of the Rolls I also agree that the judgment should be affirmed.

DENMAN, J. I confess that the case of *Brown* v. *Tibbits* (1) appeared to me at first to throw a difficulty in the way of the construction put by the Queen's Bench Division on Lord Tenterden's Act, but there are grounds on which it may well be distinguished. The words of 6 & 7 Vict. c. 73, s. 37, are extremely like the words of s. 5 of Lord Tenterden's Act; but though they are very like, they are not the same, and they refer to a totally different subject-matter; and it is to be noted that Williams, J., puts the decision very much upon the long-established practice. Now, if long-established practice is to have any weight in the present case, the practice is in favour of the present decision, for as long ago as Strange's Reports the Statute of Limitations was held to apply to set-off. The law is so laid down in Buller's Nisi Prius, p. 180; and the recent case of *Francis* v. *Dodsworth* (2) affirms the same

(1) 11 C. B. (N.S.) 855; 31 L. J. (C.P.) 206.
(2) 4 C. B. 202; 17 L. J. (C.P.) 185.

principle, that a plea of set-off is to be treated as a cross action. Therefore, when the Statute of Set-off talks of mutual debts, the statute of 9 Geo. 4 would apply. A great deal of reliance was placed by the Lord Chief Baron on the fact that s. 4 enacts that the recited Acts and this Act shall be deemed to apply to set-off; and the words are certainly general and large enough to include s. 5, and I do not see why they should not bear this construction, so as to carry out the decision in *Remington* v. *Stevens*. (1) On the whole, therefore, I am of opinion that the decision of the Queen's Bench Division was right.

POLLOCK, B. I am of the same opinion. Our decision may well be founded on the decisions which have taken place on the Statute of Limitations and the Statute of Set-off. No doubt those are cases in courts of first instance, but this construction has been uniformly put on the statutes, commencing as far back as *Remington* v. *Stevens* (1), which was followed in *Chapple* v. *Durston* (2), and in *Francis* v. *Dodsworth* (3), where, in the passage read by Lord Justice Mellish this is pointed out. I therefore concur in holding, on that ground, that s. 5 applies to set-off, although the words of the section itself primâ facie apply only to an action. As to the cases on attorneys' bills, all that is required by the statute of attorneys before bringing an action relates to the bringing of the action, and not to the cause of action; and the analogy is rather to statutes which require notice of action, and not to an enactment like the present.

Judgment affirmed.

Solicitors for plaintiff: *West & King.*
Solicitor for defendant: *W. Tatton.*

(1) 2 Str. 1271.
(2) 1 C. & J. 1.
(3) 4 C. B. 202, 220; 17 L. J. (C.P.) 185, 187.

1876
April 26.

SHAND AND OTHERS *v.* BOWES AND OTHERS.

Mercantile Contract, Construction of—"300 *Tons of Rice to be shipped during the Months of March* and/or *April.*"

Defendants, by a contract, dated London, 17th of March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, per *Rajah of Cochin.*" The 600 tons filled 8200 bags, of which 7120 were shipped between the 23rd and 28th of February, and the last bill of lading was signed on the latter day; of the other 1080 bags, 1030 were put on board on the 28th of February, and the remaining 50 on the 3rd of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:—

Held, that, nine-tenths having been completely shipped in February, the rice was not shipped in March or April, and the defendants were not bound to accept it.

Alexander v. *Vanderzee* (Law Rep. 7 C. P. 530) distinguished.

Reed on appl. 26 B.D. 112. C.A. Reversed 4 H. & L. 2.

DECLARATION for not accepting a cargo of rice pursuant to a contract dated London, 17th of March, 1874, by which defendants bought of plaintiffs "the following Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, about 300 tons, per *Rajah of Cochin.*"

Second count on a similar contract of the 24th of March, 1874.

Plea 5: That the rice was not shipped during the months of March and/or April, 1874. Issue joined.

At the trial before Brett, J., at the London Michaelmas sittings, 1875, it appeared that the defendants bought of plaintiffs 600 tons of rice by bought and sold-notes, dated London, 17 and 24 March, 1874 respectively, for 300 tons each, in the terms set out in the declaration.

The 600 tons filled 8200 bags, and the 8200 bags were shipped, and bills of lading given for them as follows:—

1780	bags,	bills of lading	given	Feb. 23
1780	„	„	„	Feb. 24
3560	„	„	„	Feb. 28
1080	„	„	„	March 3

and of these 1080 bags, all but fifty were put on board on the 28th of February. The fifty were put on board on the 3rd of March, and the bill of lading signed on that day.

Evidence was given that rice shipped in February would be the spring crop, and would be equally as good as rice shipped in March or April. Contradictory evidence was given as to whether such a shipment as above could be a March shipment.

The case of *Alexander* v. *Vanderzee* (1) was relied on for the plaintiffs.

The learned judge left the question to the jury, was this cargo, as a cargo, a shipment in March $\frac{\text{and}}{\text{or}}$ April in the ordinary business sense of the term? adding that, if it was for him, he held the meaning to be, that if the loading had been conducted consecutively, with ordinary and reasonable dispatch, and was completed in March or April, so that the vessel, so far as the loading of the cargo was concerned, might sail in March or April, it was sufficient.

The jury said they agreed with the construction which the judge had put where the name of the vessel is given in the contract.

A verdict was accordingly taken for the agreed sum of 1636*l.* 18*s.*, and judgment was entered for the plaintiffs, with leave to move to enter judgment for the defendants.

A notice of motion was given accordingly, on the grounds: 1. That there was no evidence to support a verdict for the plaintiffs, and the judge ought to have directed a verdict for the defendants; 2. That there was error in saying that the rice was shipped during the months of March $\frac{\text{and}}{\text{or}}$ April within the ordinary meaning of the words of the contract.

The defendants also moved for a new trial, on the ground that the verdict was against the weight of evidence.

This order was refused by the Queen's Bench Division, but was afterwards granted in the Court of Appeal, cause to be shewn in the Queen's Bench Division.

April 25. *Benjamin, Q.C.*, moved to enter judgment for the defendants. On the undisputed facts the defendants are entitled to judgment. It is impossible to say that the rice was shipped in March or April. Out of the 600 tons all but four tons were shipped in February, so that this would clearly have been a

(1) Law Rep. 7 C. P. 530.

1876

SHAND v. BOWES.

February shipment, and cannot, therefore, be a March shipment. *Alexander* v. *Vanderzee* (1) was cited by the plaintiffs, and acted upon by the learned judge; but the facts there were different, and it is therefore not binding on the Court.

Cohen, Q.C., and *J. C. Mathew*, for the plaintiffs. The construction put by the judge on the contract was the right one. The surrounding circumstances must be looked at in giving a meaning to the contract; and it was an undisputed fact that rice shipped in February would be the spring crop, and would be as good, if not better, than a March shipment. The defendants were offered substantially what they contracted for, viz. a cargo of rice shipped in such time as that the vessel could sail in March or April. And it is to be observed that the ship was named by which the rice was to come, so that this was the material part of the contract; and the difference of a week or two in the shipment does not go to the root of the matter, and is immaterial as a condition precedent. *Alexander* v. *Vanderzee* (1) is really undistinguishable.

[BLACKBURN, J. We will consider the case, and will probably give judgment in the morning.]

Cur. adv. vult.

April 26. BLACKBURN, J. We have considered this case, and have come to the conclusion that the motion for judgment for the defendants should be acceded to, and therefore the judgment will be entered for the defendants.

The case turned upon this: There were two contracts, each for 300 tons of Madras rice, to be shipped at Madras or the coast during March $\frac{\text{and}}{\text{or}}$ April, 1874; and consequently the defendants, if the rice was properly shipped, either in March or April, were bound to take it, but if it was shipped in February, though the rice would be equally good, and would be just as advantageous rice for them, it was not what they bargained for, and they were not bound to take it. So that the question is, whether the rice had been shipped in March within the meaning of the contract. There is a case of *Alexander* v. *Vanderzee* (1), in the Court of Exchequer Chamber, on which my Brother Brett acted principally,

(1) Law Rep. 7 C. P. 530.

1876

SHAND v. BOWES.

and which is undoubtedly binding upon us; and we are, therefore, by no means to be supposed to be dissenting from it. In that case there was a contract for a cargo of maize for shipment in June $\frac{\text{and}}{\text{or}}$ July, old style. I may observe we do not think there is any difference, or, at all events, any substantial difference, between the phrase "a cargo for shipment in June $\frac{\text{and}}{\text{or}}$ July," and "a cargo to be shipped in March $\frac{\text{and}}{\text{or}}$ April;" as far as this goes, we think the phrases mean the same thing. Two cargoes had been shipped, and in each case the commencement of the shipment was in May, and the shipment went on and was completed in June, and then bills of lading were signed in June for the shipment which had commenced in May and finished in June. The case was tried before my Brother Brett, who asked the jury whether, in the ordinary business sense, those shipments were June shipments—though they had begun in May, being completed in June, were they June shipments? The jury found that they were; and in the Court of Error the majority of the judges (they were not all agreed) thought that it was properly a question for the jury, and the Court held, the jury having found that these were June shipments, that they were June shipments, and that the defendant was bound to take the maize.

Now, in the present case, if the facts were the same, we should be undoubtedly bound to follow that decision, and to say this was a question for the jury, and on the finding of the jury we should have to decide whether or no it was satisfactory. But the undisputed facts appear to be these: Out of the 8200 bags of rice, 1780 bags were shipped in February, and on the 23rd of February that shipment was completed, and a bill of lading was signed. Another lot of 1780 bags was shipped, and a separate bill of lading taken for them, and on the 24th of February that bill of lading was signed. Then there was another shipment of 3560 bags made; that was completed on the 28th of February, and the bill of lading was signed on that day. So that these three parcels, making very nearly nine-tenths of the whole quantity, were in every sense of the word shipped in February, the shipment being completed and the bill of lading signed in February. The next parcel of 1080 bags is in a different position. The shipment was com-

1876

SHAND v. BOWES.

menced in February, and the greater part of it, namely, 1030 bags, was shipped and put on board in February, but the shipment of that parcel was not completed until the 3rd of March, fifty bags being put on board in the month of March, and then the bill of lading was signed on the 3rd of March. Now, if the shipment of all four parcels had been like that last, commenced in February, but completed and the bills of lading signed in March, the case would have been, as far as I perceive, identical with the case of *Alexander* v. *Vanderzee* (1); and we should have been bound to say this was a question for the jury, and being left to the jury, and the jury having found for the plaintiffs, we should have to determine whether it was a satisfactory verdict. But in the view we take of it it is not necessary to decide that at all, for the three earlier parcels were, in every sense of the word, completely shipped in February. They were put on board in February, the loading was completed in February, and the bills of lading were signed in February; and if this had been a contract for a February shipment instead of a March shipment, there could be no doubt that these three parcels would have been in every sense of the word shipped in February. That being so, it does not become necessary to consider whether or not the last parcel, the shipment of which was completed in March, and the bill of lading signed in March, was shipped in March or not, for the defendants, when they bargain for about 600 tons to be shipped in March, are not bound to accept four tons shipped in March and 596 that were shipped in February. They are entitled substantially to have the whole quantity contracted for shipped in March, and consequently, upon that view, the defendants are entitled to the verdict, upon the undisputed facts.

We think it right to say that, had it become necessary to determine whether or not the verdict of the jury was satisfactory, looking at the evidence, which seems to have been strong on the one side—without saying whether it was wrong—we might have desired, in our discretion, to give a fresh jury an opportunity of saying what view they took of the matter; but in the view we take of it, that the large proportion of the shipment was

(1) Law Rep. 7 C. P. 530.

clearly a February shipment, we think the defendants are entitled to judgment.

MELLOR, J. I am of the same opinion entirely, and for the same reasons. I think in no sense could nine-tenths of these bags of rice which were put on board be said to be otherwise than rice shipped in February, the loading having been completed in February, and the bills of lading given in February. Therefore I certainly entirely concur in the opinion of my Brother Blackburn with regard to the construction of the contract. I only wish to guard myself from it being supposed that I in any sense depart from what was done in the case of *Alexander* v. *Vanderzee*. (1) The facts distinguish that case from the present, and it is unnecessary, therefore, to do more than to say, if the facts had been the same I should have felt bound by it, not merely because it was a binding authority, but because I agree with the opinion that the facts there raised a question for the jury.

In the present case I am of opinion that we ought to order the verdict to be entered for the defendants.

LUSH, J. I entirely concur in the judgments of my learned Brothers, and I have nothing to add.

BLACKBURN, J. As to the rule for a new trial, as far as this Court is concerned, we give no decision, and it will drop.

Judgment for the defendants.

Solicitors for plaintiffs: *Stevens, Wilkinson, & Harries.*
Solicitors for defendants: *Lattey & Hart.*

(1) Law Rep. 7 C. P. 530.

1876
May 5.

ROBERTS *v.* PAGE AND ANOTHER.

Friendly Society—18 & 19 *Vict. c.* 63, *s.* 19—21 & 22 *Vict. c.* 101, *s.* 7—*Proceeding touching the Right of the Society—Action against Secretary.*

By the Friendly Societies Act (18 & 19 Vict. c. 63), s. 19, the trustees of any society are authorized to bring or defend any action, suit, or prosecution in law or equity, touching or concerning the property, right, or claim to property of the society.

By s. 7 of 21 & 22 Vict. c. 101, in any proceeding under this Act or the above Act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint, the defendant.

Proceedings having been taken by a member of a society in a county court to enforce a claim against the society, a compromise was come to between the plaintiff, the solicitor of the member, and the society, by which, inter alia, the society promised to pay the plaintiff certain costs and charges. These costs and charges not having been paid, the plaintiff sued the secretary of the society in a superior court:—

Held, that this was a proceeding within s. 19 touching the right of the society, and was properly brought against the secretary under s. 7.

ACTION against J. F. Page, secretary of the Eye and West Suffolk district of the Ancient Order of Foresters Friendly Society, and W. Baker, secretary of Court Brave Old Oak, No. 3658, held at Mendlesham, a branch of the said Ancient Order of Foresters Friendly Society, established in pursuance of the statutes relating to friendly societies, the rules of which society have been duly certified by the registrar of friendly societies in England: that before, and at the time of the making of the agreement hereinafter mentioned, one T. Hipperson, being a member of the society, had preferred a claim before the appeal committee thereof, and, upon the neglect and refusal of the said committee to hear the claim, had, according to the statute in that behalf (1), made an application for relief against the said society to the county court of Suffolk at Stowmarket, and had employed the plaintiff to act as attorney and solicitor on his behalf in and about preferring the said claim before the said committee, and in and about making and conducting the said application to the said county court and transacting all necessary and proper business in connection therewith, and the plaintiff acting as such attorney and solicitor as

(1) See 18 & 19 Vict. c. 63, s. 41.

aforesaid, had incurred divers costs and expenses in and about preparing the said claim and conducting the said application as aforesaid. Whereupon it was agreed by and between the plaintiff and the society that, in consideration that the plaintiff would advise Hipperson to withdraw from the application to the county court, and would procure a stay of proceedings therein, the aforesaid claim of Hipperson should be forthwith heard by the committee of the society, and that the society would pay the costs and expense then already incurred by the plaintiff in and about preferring the claim before the committee as aforesaid, and so much of the costs and expenses so incurred in and about conducting the application to the county court as should be ascertained and found to be payable upon a taxation as between party and party. The plaintiff did so advise Hipperson to withdraw from the application to the county court, and did procure a stay of proceedings therein. And a taxation was duly made as between party and party in respect of the costs and expenses as agreed. Breach, nonpayment of the 25*l.* 14*s.* 3*d.*, the amount of such costs, &c.

Second count, repeating the allegations contained in the first count so far as they relate to the circumstances existing before and at the time of the making of the agreement therein mentioned. That thereupon it was agreed between the plaintiff and Arthur Frederick Vulliamy, on behalf of the society, as follows:—

"Debenham, Suffolk,

"November 18th, 1874.

"A. F. Vulliamy, Esq., Ipswich.

"Hipperson *v.* Foresters Friendly Society.

"Dear Sir,—I have received and am obliged for your letter of the 17th inst. I have no wish to take this case into court if we can come to a satisfactory arrangement without. My client is a very poor man, and has been put to very heavy expenses, and if you will agree to pay my counsel's fees, with brief, which are already incurred, and my costs of attending the appeal committee of Mendlesham, with my client, Mr. Hipperson, on the 26th August last, and the costs as between party and party, and also undertake that the case shall be forthwith heard, I shall be happy to stay further proceedings. I will come over to Ipswich

1876

ROBERTS v. PAGE.

by the first train to-morrow morning from Stowmarket, and hope to be with you about half-past 10; but as it is market day at Stowmarket, must return very shortly, and hope your client will be in the way and a satisfactory arrangement completed. This letter is without prejudice.

"Yours truly,

"Oscar W. Roberts."

"Ipswich, November 19th, 1874.

"O. W. Roberts, Esq., Solicitor, Debenham.

"A. O. F. *v.* Hipperson.

"I have seen my clients this morning, and they have instructed me to consent to your letter of the 18th inst. The appeal will be heard within three weeks, of which your client will have due notice.

"Yours truly,

"A. F. Vulliamy."

This count then concluded like the first.

Demurrer and joinder.

Merewether, in support of the demurrer. It is only by force of the Friendly Societies Acts that an officer of a society can be sued. By s. 7 of 21 & 22 Vict. c. 101, "In any proceeding under the said recited Act [18 & 19 Vict. c. 63] or this Act, against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint being entered or made, the defendant in such proceeding, by his name and the title of the office he holds in the society . . .;" that refers only to plaint or complaint, and not to an action. By s. 19 of 18 & 19 Vict. c. 63, "The trustees of any such society are hereby authorized to bring, or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which they are such trustees; and such trustees shall, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names, as trustees of such society, without any other description. . . ." It will be argued for the plaintiff that the secretary is substituted for the trustees by s. 7 of

the second Act; but that is not so: s. 19 remains, and applies to actions, while s. 7 applies to proceedings in the county court and before justices. But even if the secretary is to be taken as substituted for the trustees, this is not such an action as is contemplated by s. 19; for it simply relates to a contract compromising a law proceeding, and does not touch or relate to the real or personal property of the society.

[LUSH, J. It is an action relating to the right of the society; the words are, "any action . . . touching or concerning the property, right, or claim to property of the society."]

"Right or claim to property" means right to property or claim to property, which this is not.

Loyd, for the plaintiff, was not called upon.

BLACKBURN, J. I am of opinion that there must be judgment for the plaintiff. The friendly society had entered into a contract for the compromise on equitable terms of a pending proceeding against them. The plaintiff sues on that contract, being the attorney for the member who had commenced the proceedings against the society. Nothing is stated to shew that the client might not have sued the society. The question is, how is the plaintiff to enforce the agreement? The friendly society is constituted under the statute, and by the enactments of the statute it is not everything that the society can do; but there are certain matters included in which the society has a concern, either relating to property or by which it is liable to have its funds taken away. By 18 & 19 Vict. c. 63, s. 19, "the trustees of such society are authorized to bring or defend any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society; and such trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued in any court of law or equity in their own names." It seems to me that in this action the society is interested in a contract in which the right to property is concerned, and that it is not a matter ultra vires. Then s. 7 of 21 & 22 Vict. c. 101 says that, in any proceeding under the recited Act or this Act against a society, it shall be sufficient to make the secretary or other officer the defendant. Is an action which would be

1876

ROBERTS v. PAGE.

against a trustee under the first Act a proceeding under that Act? I think it is; and it is unnecessary to inquire whether this would be a proceeding under the second Act. Judgment must, therefore, be for the plaintiff.

LUSH, J. I am of the same opinion. Certain contracts are competent to the society to make. The employment of a solicitor seems to be contemplated by ss. 19 and 24. How is he to recover his costs? Surely he is not to be left without remedy. Practically it would be so, if he must sue every individual member. It must have been the intention of the Act to do away with this difficulty, and to enable him to proceed against the officer of the society. It seems to me that the terms of s. 19 are wide enough to include the present case. "Right" means something beyond "property," or "claim to property."

FIELD, J. It seems to be established that this contract was one which the society might lawfully enter into. The society is a fluctuating body, and such body having entered into the contract, the legislature, to prevent the injustice which would ensue if there was nobody who could be sued but the members of the society at large, has given facilities by naming persons who may sue or be sued, viz. the trustees under the first Act, for which the secretary or other officer is substituted in the second Act. And they are to bring or defend any action touching or concerning the property, right, or claim to property of the society. The question is, whether that goes far enough to include the present case. The property of the society might certainly be affected in the present action; and therefore I think the action is rightly brought against the officer.

Judgment for the plaintiff.

Solicitor for plaintiff: *G. J. Brownlow.*
Solicitors for defendants: *Vulliamy & Co.*

RE ELLERSHAW AND OTHERS, JUSTICES OF THE BOROUGH OF LEEDS. EX PARTE LONGBOTTOM.

1876
May 8.

Supreme Court of Judicature Act, 1873 (36 & 37 *Vict.* c. 66), s. 45—20 & 21 *Vict.* c. 43—*Appeal from Inferior Court—Rule to Justices to state Case.*

An application for a rule calling upon justices to shew cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to the Court of Queen's Bench Division, and not to the Divisional Court of Appeal.

A. Wills, Q.C., moved for a rule calling upon justices of the borough of Leeds to state and sign a case for the opinion of the Court, under 20 & 21 Vict. c. 43. (1) A question has arisen whether the application is not an appeal which ought to be made to the Divisional Court of Appeal from Inferior Courts. (2)

PER CURIAM (Blackburn, Quain, and Field, JJ.). The application is not an appeal within 36 & 37 Vict. c. 66, s. 45, and is properly made to this Division, to which all matters within the exclusive jurisdiction of the Court of Queen's Bench are assigned by s. 34.

Rule granted.

Solicitors: *Torr, Janeway, Tagart, & Co.*

(1) 20 & 21 Vict. c. 43, after providing that justices on application of a party aggrieved shall state a case for the opinion of one of the Superior Courts, by s. 4 enacts:—

"If the justice or justices be of opinion that the application is merely frivolous, but not otherwise, he or they may refuse to state a case, and shall, on the request of the appellant, sign and deliver to him a certificate of such refusal," &c.

By s. 5, "where the justice or justices shall refuse to state a case as aforesaid, it shall be lawful for the appellant to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also upon the respondent, to shew cause why such case should not be stated, and the said Court may make the same absolute, or discharge it, with or without payment of costs, as to the Court shall seem meet. . . ."

(2) The Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45: "All appeals from petty or quarter sessions, from a county court, or from any other inferior court, which might before the passing of this Act have been brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose," &c.

1876
Feb. 14.

THE QUEEN ON THE PROSECUTION OF HARGRAVES AND OTHERS *v.* STEEL AND OTHERS.

*Costs—Information for Libel—*6 & 7 *Vict. c.* 96, *s.* 8—*Defendants' Costs before filing of Information.*

Where upon the trial of an information for libel under 6 & 7 Vict. c. 96, judgment is given for the defendant, he is entitled to recover from the prosecutor costs incurred previously to the filing of the information; Blackburn, doubting.

RULE calling on the defendants to shew cause why the master should not review his taxation of the defendants' costs in this prosecution.

It appeared that a rule having been made absolute for a criminal information against the defendants for an alleged libel by them, the information was tried at Carlisle, at the summer assizes, 1875, and there was a verdict of not guilty. In taxing the defendants' bill of costs the master allowed a number of items in it which were incurred previously to the filing of the information. This rule was then obtained.

C. Russell, Q.C., and *Crompton*, shewed cause. The costs prior to the information were properly allowed. The object of the Act 6 & 7 Vict. c. 96, s. 8 (1), was to indemnify the defendant against the expenses which he had been compelled to incur: per Lord Campbell, C.J., in *Reg.* v. *Latimer.* (2) The words, "by reason of such information," are comprehensive, and are inconsistent with the idea that it was intended only to give the defendant the costs of part of the proceedings. The words must be taken to mean "the costs of preferring such indictment or information." The

(1) 6 & 7 Vict. c. 96, s. 8: "In case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried."

(2) 15 Q. B. 1077; 20 L. J. (Q.B.) 129.

S C on appeal to Ex. Ch. affirmed 2 Q.B.D. 91 C.A.

1876

THE QUEEN v. STEEL.

prosecutors will rely on *Reg.* v. *Cavendish* (1), where it was held that if the prosecutor fails on a criminal information the defendant is only entitled to the costs incurred subsequently to filing the information. But no reasons for the decision are given in the report, and it proceeded on a wrong construction of the statute. In the case of an indictment after a summons before magistrates, it would seem that the defendant would be entitled to all his costs: *Richardson* v. *Willis.* (2)

H. Sutton, in support of the rule. The costs ought not to have been allowed. They were not incurred "by reason of the information." The object of 6 & 7 Vict. c. 96, was merely to dispense with the necessity on the part of a successful defendant of estreating the prosecutor's recognizance under 4 & 5 Wm. & M. c. 18, s. 2. (3)

(1) 12 Ir. Law Rep. 230.

(2) Law Rep. 8 Ex. 69.

(3) 4 & 5 Wm. & M. c. 18, recites that "malicious and contentious persons have more of late than in times past, procured to be exhibited and prosecuted informations . . . and after the parties so informed against have appeared to such informations and pleaded to issue, the informers do very seldom proceed any further, whereby the persons so informed against are put to great charges in their defence; and although at the trials of such informations verdicts are given for them, or a noli prosequi be entered against them, they have no remedy for obtaining costs against such informers."

By s. 2: "The clerk of the Crown in the Court of Queen's Bench for the time being, shall not, without express order to be given by the Court, in open Court, exhibit, receive, or file any information, &c., or issue out any process thereupon before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title, or profession, to be entered, to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such informations or information, and abide by and observe such orders as the said Court shall direct, which recognizance the said clerk of the Crown, and also every justice of the peace of any county, &c., are hereby empowered to take, and in case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto and plead to issue; and that the prosecutor or prosecutors of such information or informations shall not, at his and their own proper costs and charges, within one whole year next after issue joined therein, procure the same to be tried, or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a noli prosequi to be entered, then, and in any of the said cases the Court of King's Bench is hereby authorized to award to the defendant and defendants his, her, or their costs, unless the judge before whom such information shall be tried shall, at the trial of such information

1876

THE QUEEN v. STEEL.

The practice in other proceedings on the Crown side of the Court, such as quo warranto and prohibition, affords instances of the right to costs being limited to those in respect of part only of the proceedings: Gray on Costs, p. 444. *Reg.* v. *Cavendish* (1) is precisely in point; and though the reasons of the decision are not given in the report, yet the order is set out at the end of the case and shews distinctly that costs like those now in question were disallowed.

BLACKBURN, J. I think that there would be no advantage in postponing our decision, and that this rule ought to be discharged. The question turns entirely on the construction of 6 & 7 Vict. c. 96, s. 8. Before the passing of this Act the defendant had at common law no right to recover costs from the prosecutor of a criminal information, but under 4 & 5 Wm. & M. c. 18, the defendant, in the event of an acquittal, was enabled to recover his costs, though the only mode of obtaining them was by enforcing the prosecutor's recognizance in the penalty of 20*l.*, which the Act compelled him to give before he could file the information. The words of 4 & 5 Wm. & M. c. 18, s. 2, are, that in case there is a verdict for the defendant, or a noli prosequi, the Court is authorized to award to the defendant and defendants his or their costs; and these words clearly enough mean "all costs;" and if the practice then existed of applying for a rule nisi for an information, no doubt the costs of shewing cause would have been part of the costs which the Court was authorized to award. This being the state of things, and the defendant having only this mode of obtaining his costs, unless the judge certified that there was reasonable cause for exhibiting the information, Lord Campbell's Act, 6 & 7 Vict. c. 96, was passed for the purpose of amending the law relating to criminal informations. There are several sections which are not material here, but s. 8 provides that if judgment be

in open court, certify upon record that there was a reasonable cause for exhibiting such information, and in case the said informer or informers shall not, within three months next after the said costs taxed, and demand made thereof, pay to the defendant or defendants the said costs, then the defendant and defendants shall have the benefit of the said recognizance, to compel them thereunto."

(1) 12 Ir. Law Rep. 230.

1876

THE QUEEN v. STEEL.

given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea. In either case the words of the section are the same: "The costs sustained by reason of the indictment or information," and "the costs sustained by reason of such plea;" and the question is, whether these words are extensive enough to include all costs incurred by reason of the information, or whether they are confined to the costs of the information after the information has been preferred. My own impression rather is that the words are not enough to include costs prior to the filing of the information. I do not think that any analogy can be derived from the statute 9 Anne, c. 20, s. 5, giving costs to defendants who obtain judgment in quo warranto informations, for in such cases there was already a remedy under 4 & 5 Wm. & M. c. 18, inasmuch as the relator was obliged to enter into a recognizance before exhibiting his information. But the words of Lord Campbell's Act are not so extensive as those of the earlier statute; and when we look at the words "by reason of such indictment or information," and "by reason of such plea," I cannot but think that they only apply to costs subsequent to those proceedings. That is my own impression, and then there is the decision of the Irish Court in *Reg.* v. *Cavendish.* (1) The Court certainly give no reasons for their decision, but the decision fortifies my doubts. I think, however, that there would be no advantage in arguing the point over and over again, and I will only say that, though I do not actually dissent from my learned Brothers, I am very doubtful. The rule will be discharged.

MELLOR, J. I also am of opinion that this rule ought to be discharged; but I confess that not only the doubts of my Brother Blackburn, but the decision of the Irish judges, have caused me some difficulty. If I could ascertain what were the reasons upon which those judges proceeded, I should have been more satisfied.

(1) 12 Ir. Law Rep. 230.

1876

THE QUEEN v. STEEL.

No doubt the counsel in support of the rule had a right to rely on it as a judgment in his favour, but we cannot tell whether the reasons on which the judges proceeded are the same as those which have caused the doubt in the mind of my Brother Blackburn. Now, the Act 6 & 7 Vict. c. 96 was passed for the purpose of amending the law, not in one case only, but in several. For example, where the issue is found against the defendant on a special plea of justification, the statute gives the prosecutor his costs, and I think that, looking at the whole frame of the statute and the previous Act 4 & 5 Wm. & M. c. 18, the object of the legislature was to simplify the whole practice as to defendant's costs, the principle being that he should be indemnified against the expenses to which he had been put. No reason is suggested why the defendant should be entitled to the costs of an indictment, but not to these costs; and when I look at s. 8, I see that he is to have the costs, "by reason" of the indictment, which would be unnecessary and impertinent if the narrow construction of the Irish Courts is to prevail. Thinking that an indemnity was what was contemplated by the Act, I think that we should carry out its intention by discharging this rule.

LUSH, J. I am of the same opinion. I cannot but feel diffidence after the doubts expressed by my Brother Blackburn and the decision of the Irish judges. The report, however, of this decision is not satisfactory; no reasons are given, and though I should have been disposed to follow it if the reasons had appeared, I think in their absence we must consider the point as if it had arisen for the first time. I do not think that the language of the previous Acts is a safe guide, but I think we must construe the present Act having regard to the object of the legislature and the state of the law when it was passed. Now, the Act of William and Mary had been passed to redress the grievance arising from vexatious informations, and s. 2 is as follows:—[The learned judge read part of the section]. After this Act it was the practice never to grant an information for libel without requiring the prosecutor to enter into a recognizance. Then came Lord Campbell's Act, which I cannot think was intended to take away any of the benefit conferred by the former Act. On the contrary, the law is extended

to indictments, and s. 8, in my opinion, intended by the words "by reason of the information" to include the costs of the preliminary proceedings. It is true that the same words are used in the following clause with regard to the costs of a prosecutor upon a vexatious plea. But it must be remembered that, ordinarily, in all informations, the prosecutor has no right to costs. Therefore, as I read the section, the defendant remains entitled to costs as before, while the prosecutor is allowed his costs in certain specified cases. I think, therefore, that this rule ought to be discharged.

Rule discharged.

Solicitors for prosecutor: *James, Curtis, & James.*
Solicitors for defendants: *Carter & Bell.*

RUSTOMJEE *v.* THE QUEEN.

Jan. 28, 31.

Petition of Right—Money received by the Queen from foreign State on Account of Debts due from Subjects of that State to British Subjects—Statute of Limitations.

5 C.P.D. 427

By a treaty between the Queen of England and the Emperor of China, the Emperor agreed to pay to the British government the sum of 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent being largely indebted to British merchants. The money having been received by the British government:—

Held, that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants.

The Statute of Limitations does not apply to a petition of right.

Affirmed in 6 App. Cas. 2 C.P.D. 69.

PETITION of right by Heerjebhoy Rustomjee.

1. The suppliant, being a subject of the Queen, carried on the business of a merchant from the year 1835 to the year 1856 at the port of Hong Kong, in China.

2. Previous to the treaty of Nankin made between the Queen and the Emperor of China, the government of the Emperor licensed certain Chinese merchants to trade with British and other foreign merchants within the dominions of the Emperor, and foreign merchants were permitted to trade with such licensed Chinese merchants only. These licensed Chinese merchants formed a body or corporation, and were named a Cohong. One of

1876

RUSTOMJEE v. THE QUEEN.

the incidents of the Cohong was, that all the members of the Cohong were jointly liable for the merchant debts of any member of the Cohong due to any foreign merchant on his failure to pay the same. Such liability of the Cohong was enforced by the viceroy of the Emperor, who, on a petition addressed to him by the creditor, issued an edict directing the Cohong to investigate and settle the claim of the creditor if found to be correct.

3. When such investigation had taken place, and the amount had been settled by the Cohong, and the mode of payment arranged between the Cohong and the creditor, an entry setting out the amount of the debt and the terms of payment was made in a book belonging to the Cohong called the Consoo Fund Book.

4. The suppliant, in and previous to the year 1838, had business transactions to a large extent with a Chinese merchant, of firm of merchants, called the Tungcheong Hong, being a member of the aforesaid Cohong. In the month of September, 1838, the said firm Tungcheong Hong was indebted to the suppliant in the sum of $34,230 92c., which debt, at the time of the events herein after set out, was due to the suppliant from the Tungcheong Hong and payable by them to him. The Tungcheong Hong became bankrupt, and was unable to pay the same to the suppliant, and the debt became due and payable by the Cohong to the suppliant.

5. Immediately upon the failure of the Tungcheong Hong the suppliant forwarded his petition in due and proper time to the viceroy, who thereupon issued his usual edict to the Cohong for the investigation of the claim made by the suppliant, and payment by the Cohong of such sums as were due from the Tungcheong Hong to the suppliant.

6. During the course of such investigation by the Cohong, and before the claim and the amount of the same could be entered in the Consoo Fund Book, serious troubles broke out in Canton between the Chinese and the Queen's subjects carrying on business there, and war shortly afterwards was declared between Her Majesty and the Emperor of China, and the British merchants residing in Canton, including the suppliant, were arrested and imprisoned, and finally expelled from China.

7. Her Majesty's superintendent of the trade of British merchants in China at Canton at the time of the aforesaid occurrence

was Captain Elliot, and to him the suppliant at the time forwarded the full particulars of his claim against the Tungcheong Hong, and the suppliant waited on Captain Elliot in May, 1839, and handed him his claim against the Tungcheong Hong, and Captain Elliot promised that the claim would be registered in the books of the superintendent of trade, and that Her Majesty would compel the Chinese government to pay the same when terms were arranged between the two governments.

8. After the before-mentioned troubles, and before the close of the war, certain articles for a treaty between the Queen and the Emperor of China were in course of negotiation, and one of the terms of the negotiation was the payment by the Emperor of China to Her Majesty of a sum sufficient to cover the debts due from members of the Cohong to merchants who were the Queen's subjects, and for the purpose of liquidating the same, which the Queen's representative undertook and agreed to do.

9. Thereupon, during the negotiation of the treaty, Sir Henry Pottinger, having succeeded Captain Elliot, arrived at Macao in June, 1841. A few days after his arrival the suppliant, with other British subjects, waited on Sir Henry Pottinger with reference to the claims against the Cohong, and Sir Henry Pottinger promised the suppliant and others that the claims should be insisted on against the Chinese government, and that the amount should be paid to them when received from the Chinese government.

10. On the 26th day of August, 1842, a treaty of peace was entered into and signed, between the Queen and the Emperor of China whereby, among other things, the Emperor of China agreed to pay to Her Majesty the sum of $3,000,000, as and for the amount of debts due to British subjects, of whom the suppliant was one, by Hong merchants. (1) The said sum of $3,000,000 was computed

(1) At the request of the Court, a copy of the treaty was procured — Treaty of Nanking, 29 August, 1842, between the Queen of Great Britain and Ireland and the Emperor of China— of which Article V., the article in question, was as follows :—

"Art. V. The government of China having compelled the British merchants trading at Canton to deal exclusively with certain Chinese merchants, called Hong merchants (or Cohong), who had been licensed by the Chinese government for that purpose, the Emperor of China agrees to abolish that practice in future at all ports where British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please; and His Imperial Majesty further agrees

1876

RUSTOMJEE v. THE QUEEN.

on the basis of the accounts of claims sent in to Captain Elliot, of which the claim sent in by the suppliant, as above-stated, was one. And the said sum of $3,000,000 was in the terms of the said treaty paid to the plenipotentiary or plenipotentiaries of the Queen, for the purpose of paying the said claims as he had agreed and contracted, as before stated, with the British merchants, of whom the suppliant was one, to do.

11. Various applications have been made from time to time by the suppliant for the payment to him of his claim, both to the representative of the British government at Canton and also to the officers of the Treasury, and although a reasonable time has elapsed to entitle the suppliant to be paid the sum of money, together with interest thereon, the suppliant has never yet received or been paid the same or any part thereof.

The suppliant therefore prays that Her Majesty may be pleased to direct the payment of the said sum to him, with interest, together with the costs of this petition.

Second plea, that the several supposed grievances and causes of petition in the said petition contained, did not, nor did any of them, accrue to the suppliant within six years next before presenting the petition.

Demurrer to the petition, and joinder.

Demurrer to the second plea, and joinder.

Jan. 28. *Thesiger, Q.C.* (with him *Cock*), for the suppliant (1), contended that a petition of right was the only remedy the suppliant had, and must extend to such a case as the present. He referred to *Baron de Bode* v. *Reg.* (2); *Thomas* v. *Reg.* (3); *Feather* v. *Reg.* (4)

---

to pay to the British government the sum of 3,000,000 of dollars, on account of debts due to British subjects by some of the said Hong merchants, or Cohong, who have become insolvent, and who owe very large sums of money to subjects of Her Britannic Majesty." See Hertslet's Treaties, vol. vi., p. 222.

(1) There being cross-demurrers counsel for the suppliant began: see *Churchward* v. *Reg.*, Law Rep. 1 Q. B. at p. 183.

(2) 8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 449, 468.

(3) Law Rep. 10 Q. B. 31, 43.

(4) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

1876

RUSTOMJEE v. THE QUEEN.

Jan. 31. *C. Bowen* (with him *Sir J. Holker, A.G.*), for the Crown, contended that the Queen could be treated neither as agent nor trustee for a subject, and therefore there was nothing on which to found a petition of right. He also contended that the Crown, though not mentioned, might take advantage of the Statute of Limitations; on this point he cited Chitty on the Prerogative of the Crown, p. 382; 11 Co. 68, b; *Tobin* v. *Reg.* (1); s. 7 of 23 & 24 Vict. c. 34; Story's Conflict of Laws, § 576; *Huber* v. *Steiner* (2); and *Harris* v. *Quine.* (3)

[BLACKBURN, J. The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it.

LUSH, J. And s. 7 of 23 & 24 Vict. c. 34, extends to a petition of right set-off, inter alia, but not the Statute of Limitations.]

Cock was heard in reply.

COCKBURN, C.J. This case appears to me to be very clear, and not to require any further consideration. I am clearly of opinion that the demurrer must prevail and that the petition of right, under the circumstances stated, will not lie.

The facts are short and simple. English merchants, who were English subjects in Hong Kong, were authorized by the existing law of China to trade only with merchants belonging to a particular guild, called the Cohong. If individual members of the guild became indebted to such English subjects, the remedy was against the guild, or Cohong, itself. A debt was incurred by one of the members of that guild to the present suppliant, and his ordinary remedy to get this paid would have been by the proceedings established by the existing law of China against the Cohong. War broke out between this country and China; the Cohong was abolished; and the remedy which the British subjects, the present suppliant among them, would have had under the former state of things was swept away. Under these circumstances, when peace was restored and a treaty of peace was entered into between the Queen and the Emperor of China, provision was made for doing justice to British subjects who had been deprived of their remedy

(1) 14 C. B. (N.S.) 505; 32 L. J. (C.P.) 216.

(2) 2 Bing. (N.C.) 202.

(3) Law Rep. 4 Q. B. 653.

1876

RUSTOMJEE v. THE QUEEN.

to enforce their claims against members of the Cohong; but the terms of the treaty were that the money given by the Emperor of China to make good these claims should be given, not to the individual merchants who had claims or debts against members of the Cohong, but should be paid to her Majesty.

Now the effect of such a treaty is, in my opinion, simply this, that it places the fund at the disposition of her Majesty, for her Majesty at her discretion to cause such distribution of it to be made as shall make good the claims which her subjects have against the foreigner from whose government the money is received. In such a case a petition of right will not lie. The notion that the Queen of this country, in receiving a sum of money in order to do justice to some of her subjects, to whom injustice would otherwise be done, becomes the agent of those subjects, seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say, that the sovereign becomes the trustee for subjects on whose behalf money has been received by the Crown, appears to be equally untenable. It comes simply to this, that her Majesty, in order to enable her to see that injustice is not done to her subjects, stipulates for the payment into her hands of a sum of money. The distribution of that must be left to her Majesty's discretion; no petition of right has ever been held to be applicable to such a case. To my mind, it is utterly inconsistent with all the constitutional theories of the prerogative of the Crown, to suppose that her Majesty can be coerced by a petition of right into doing that justice which, I am quite sure, it will require no petition of right to obtain, if the facts and the merits of the case were such as to induce the government to believe that the claim was a just one. At all events, I think the petition of right will not lie, and that that is perfectly clear upon all the principles which have ever been applied to petitions of right and all the precedents which have hitherto existed in courts of law.

As to the Statute of Limitations, that was disposed of in the course of the argument. The observations of my Brother Blackburn were quite sufficient to dispose of that, namely, that the Crown cannot be bound by Acts of Parliament which have relation only to the course of procedure between subject and subject.

BLACKBURN, J. I am of the same opinion on both points. The treaty in this case made between Her Majesty, in the exercise of one of the highest branches of her prerogative, and the Emperor of China, amongst other articles, stipulated that the Emperor of China should pay into the hands of her Majesty 3,000,000 of dollars in respect of the debts due from the members of the Hong or Cohong, to British subjects; and upon that it was contended, and the argument of Mr. Thesiger went so far as this, that her Majesty, in making that treaty and securing that money, was to be considered as an agent for each one of those British subjects individually. I certainly am not aware of any authority whatever in the English law that has ever put the sovereign in such a position when exercising an act as the body politic,—to use the old phrase, "the sovereign in the capacity of the body politic, exercising an act of prerogative." To say that the Queen was the agent of any person seems to me to be utterly unfounded upon any authority whatever. There are plenty of old cases upon which the dignity of the Crown is exaggerated beyond measure. This has been carried to such an extent, that I should certainly pause or hesitate whether I would follow it at the present day to the full extent; but to bring down her Majesty to the situation of it being said of her, that in making a treaty of peace with the Emperor of China she was an agent for everybody who had a claim against the Emperor of China, is totally without authority. And I believe, that if one or two hundred years ago any counsel had argued in that way, we should have been asked to record his words in order that he might be sent to the Tower, a course which is not pursued now-a-days. The position, however, is quite untenable. Then, when her Majesty has actually received the money, it is a little more plausible, a little, but not very much more plausible, to say that, though the treaty was made in the exercise of her prerogative, yet when her Majesty did receive the money it ought to be given to those persons who have claims. Now the position of the person appearing upon this particular petition of right, this particular suppliant, is this, that he had a claim against one of these Hong merchants. That claim, according to what is stated, and I have no doubt accurately stated, to be the course of procedure in China, was referred by the Chinese Emperor to the Hong or Cohong, for the purpose of inves-

1876

RUSTOMJEE v. THE QUEEN.

tigation with a view to its settlement, if upon investigation it proved to be well founded; and it is stated in paragraphs 5 and 6 of the petition that the case of the suppliant had gone as far as this, that it had been referred to the Cohong, and during the course of the investigation and when it had not been investigated or settled, the war broke out, and of course the investigation never went any further.

Now, I think that, in taking it in fair and honourable dealing, it is obvious—I am not now saying whether it would be enforced in law or not—but it is obvious that the claim of the person under these circumstances cannot possibly go further than a claim to say, "Let my case be investigated in some way or other, whether my claim was just and well founded or not." It is impossible to say that because a man had sent in a claim that might have been for a very large sum, against a Hong merchant, and that had never been investigated, the Queen, after receiving those three millions, without further inquiry, was bound to hand over the amount claimed, or that her ministers could be justified or excused in handing it over to the man without investigation as to whether his claim was right or not. That would have been very unjust to the other persons who had claims, and who were to share the limited fund. The utmost, therefore, that could be said that this person had any right to require from the ministry acting for the Queen would be this, "Investigate my claim, and see whether it is good or not." But that is not exactly what is asked for here. The suppliant puts it here that he is entitled as of right that her Majesty should pay him the money. I, however, do not know whether one would stand upon that, because, after all, it might be intended by the petition to say that the claim of right was that her Majesty should order and direct an investigation to be made. That brings us to consider whether or not this is a matter upon which a petition of right would lie. It is quite impossible to say that her Majesty is in any sort of position of having received the money to the use of this person; and to say that there has been privity of contract between this person and the Queen, either an express or implied contract, so as to make her the agent to hold the money for him, as if she had been a subject. According to *Williams* v. *Everett* (1) it seems to be out of the question. There is nothing

(1) 14 East, 582.

in the least approaching to such a contract. The more plausible analogy would be to say that her Majesty stood in the position of a trustee for creditors who had received the money from the insolvent debtor, or from the debtor, who for that matter, may not be insolvent, but going away. Having received the money on trust to divide it amongst the creditors, a Court of Equity would cause an investigation to be made in order to discover who is entitled, and direct the money to be held for them. That would be the more plausible way of putting it; but, as I have already said, that is not the form of relief asked for here. But even if the petition had been shaped in that way it would have been untenable, for this reason: that the Queen in making a treaty and receiving money under it, and exercising a high act of prerogative, is not at all acting as a trustee. If it were a trust, there are plenty of old authorities to which I might refer; certainly some of those referred to in Plowden's Commentaries, p. 238, in which it has been held that the sovereign in his body politic capacity could not be seised to a use. The use was gone when the sovereign as the body politic got the land from the feoffee to uses, which was a gross injustice, but it was the settled law. Walsh's opinion in the instance of Richard III. is mentioned; but that in consequence of his having been feoffee to uses for a great many persons when he became sovereign, the matter was investigated; and it being found that by law although he held them to the use of the subject, on his becoming sovereign he had them to the use of the Crown, and not to the use of the subject, which would have been a gross injustice, a private Act of Parliament was passed saying that all those lands which he had held as feoffee to the use of the subject should be held in fee by the cestui que use exactly as if the lands had been conveyed to them. The same course was taken afterwards in framing the great Statute of Uses to carry them into execution, in exactly the same way as in that instance; but that was a strong example of how the matter was considered by the lawyers of those days, when certainly petitions of right were more known. It was held and considered that the trust was not enforceable in any way against the Crown, and there are many authorities to the same effect, which it is not necessary to go into. But I do not think that it can possibly be said that when the Queen has, as a high act

1876

RUSTOMJEE v. THE QUEEN.

of state, made a treaty, and received money in consequence of an act of state, the mode of distributing it is in any way enforceable by a Court of law, or subject to the findings of juries. I think there is a moral claim that it be given to the right person, which must be investigated in the manner in which her Majesty is pleased to direct, and the ministers who direct it would probably be responsible in Parliament if they did it unjustly. I do not suppose for one moment that they have done so; but I am quite clear in this, that you cannot in a Court of law direct an investigation, and conduct it in the Court of Queen's Bench with the aid of a Middlesex jury. I think it must be done by the officers of state, subject to responsibility in such a way as may be just and proper. I have no doubt they have done so; but whether or not they have done so is a question which must be ascertained in Parliament, and not here.

With regard to the Statute of Limitations, I do not think it is necessary to say any more. There seems to be no pretence for saying that the statute applies at all to the Crown. It would, no doubt, be very proper, and right, and judicious for the legislature to pass an Act to say that in future some statute of limitation shall apply, but it has not been done yet.

LUSH, J. I am also of the same opinion, that the claim put forward in this petition is not one that can be the subject of adjudication in this Court. I believe this is only the second time that such a question has arisen. I am not aware that it was ever brought forward till the *Baron de Bode's Case* (1), and it is remarkable that the judges, both in the Court of Queen's Bench and in the Court of Error, and I think also in the House of Lords, carefully abstained from intimating any opinion on one side or the other upon this particular question. It comes, therefore, before us for the first time, and we have to decide upon principle. I must say upon that I entertain not the slightest doubt, whether this claim be treated as what it certainly purports to be on the face of the petition, a demand of a debt due from the Crown to the suppliant for money had and received by the Crown to his use, or whether it be treated as the claim of a cestui que trust to charge the Queen

(1) 8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 468.

as trustee with the receiving of that money. Now, taking it, as it appears to be, as a demand of a debt due from the Crown for money had and received, it is necessary to assume, in order to reach that conclusion, that the Queen, when this money was received, received it as agent of the suppliant, that is, under his authority, or claiming to have his authority to receive it for his use. Now, I must say that proposition startles one. It is not only derogatory to the sovereign's dignity, but I think it is repugnant to every constitutional principle. A treaty is an act of prerogative. In making, and negotiating, and perfecting that treaty the Crown acts of its own inherent authority, not by the authority, actual or supposed, of any subject; and I think all that is done under that treaty is as much beyond the domain of municipal law as the negotiation of the treaty itself; and when this money was received, it was received by the sovereign in her sovereign character, not at all, in any view of it, actual or constructive, as the agent of any subject whatever.

It seems to me that the relation which is pressed upon us here never existed in this case between the Crown and the subject, and is one which cannot exist in any state like ours between the sovereign and the subject. No doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China; but then the distribution when made would be, not the act of an agent accounting to a principal, but the act of the sovereign in dispensing justice to her subjects. For any omission of that duty the sovereign cannot be held responsible. The responsibility would rest with the advisers of the Crown, and they are responsible to Parliament, and to Parliament alone. In no view whatever can an individual subject have any such claim as the suppliant pretends to have by this petition, namely, a claim to coerce the sovereign by judicial proceedings into the payment over of a part of the indemnity received in her sovereign character from the Emperor of China.

Again, if this were treated, not as the demand of a debt recoverable at common law, but as a trust, a similar answer would be given, and it is equally valid, that no subject can charge the

1876

RUSTOMJEE v. THE QUEEN.

Crown with being a trustee for him. Moreover, for the same reason that I have already given, it cannot be deemed to have been money received by the sovereign as trustee. It was received by her in her sovereign character, to be dispensed, as I have said, according to the views of the advisers of the Crown as to the persons entitled and the amounts which should be fair and just as regards the claims of the parties. What the particular reason of the petitioner may have been for taking this course I cannot tell. It is a very long time since the money was paid over, and, as he says he has put forward his claims many times, I cannot help thinking that there has been the ordinary inquiry and investigation into the claims of the parties, and that the money has been distributed as the advisers of the Crown have thought just; and that the suppliant for some reason is dissatisfied with that distribution, and wishes to see whether he can have the matter brought before a jury. For the reasons I have given I think he cannot. I think there is no pretence for making such a claim as this the foundation of a petition of right, whether it be considered the claim of a debt or the claim for a breach of trust.

Judgment for the Crown on the demurrer to the petition, and for the suppliant on the demurrer to the second plea.

Solicitor for suppliant: *A. G. Ditton.*

Solicitors for the Crown: *Raven & Hare, for the Solicitor to the Treasury.*

DAWKINS *v.* PRINCE EDWARD OF SAXE WEIMAR.
DAWKINS *v.* WYNYARD.
DAWKINS *v.* STEPHENSON.

1876
May 2.

Abuse of Process of Court—Staying frivolous and vexatious Action—Groundless Action against public Officer.

Actions were brought, charging the defendants with conspiring to make, and making, false statements respecting the plaintiff, an officer in the army, to the commander-in-chief, whereby the plaintiff was placed on half-pay. Upon application to stay the actions as frivolous and vexatious, and an abuse of the process of the Court, it was stated in the defendants' affidavits that the actions were for acts done by the defendants in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff:—

Held, that the actions ought to be stayed, on the ground that *Dawkins* v. *Lord Rokeby* (Law Rep. 7 H. L. 744) was a case directly in point that an action under such circumstances would not lie.

Castro v. *Murray* (Law Rep. 10 Ex. 213) followed.

5 P.D. 20
21 Ch.D. 202
205
10 Q.B.D. 416

Applications having been made at Chambers to stay these actions as frivolous and vexatious, and an abuse of the process of the Court, they were referred to the Court.

It was alleged in each action that the plaintiff was a lieutenant-colonel in the army and a captain in the regiment of Coldstream Guards, and that the defendant wrongfully and maliciously conspired with other persons, by falsely, and without any reasonable or probable cause, representing to the commander-in-chief that the plaintiff was unfit to command in the said regiment, to deprive the plaintiff of his rank of lieutenant-colonel, and of his commission as captain, and, in furtherance of the said conspiracy, the defendant and the said other persons did falsely and maliciously, and well knowing the same to be false, and without any reasonable or probable cause, represent to the commander-in-chief as aforesaid, whereby the plaintiff was deprived of his rank of lieutenant-colonel and of his commission as captain. A second count in each action varied the allegation of damage, by saying that the plaintiff was placed on half-pay, and was injured in his reputation as an officer, and was deprived of his rank and commission.

In support of the application to stay proceedings in each action the defendant made an affidavit, stating in substance that, in February and March, 1865, he was a member of a military court of

1876

DAWKINS v. PRINCE EDWARD OF SAXE WEIMAR.

inquiry upon the conduct of the plaintiff, then a lieutenant-colonel in the Coldstream Guards, which court, in the discharge of its official and judicial duties, reported, on the 29th of March, 1865, to the commander-in-chief, and that the action was brought for and in respect of the official and judicial acts done by the plaintiff as member of the court of inquiry, and for and in respect of no other matter or thing whatsoever; that when he became a member of the court he knew nothing of the plaintiff personally, and the allegations in the declaration, charging him with conspiracy and false representation, were without foundation.

In answer to the application, the plaintiff made in each action an affidavit, saying in substance that the action was not brought vexatiously or frivolously, or in abuse of the process of the Court, but perfectly bonâ fide and to vindicate his position and character, and that he was prepared to support the same by evidence in his possession. The plaintiff's affidavits in the second and third actions contained also an express statement that the allegations in the declaration, charging conspiracy and false representation, were true and well founded.

C. S. Bowen, for the defendants in the first and second actions. The declarations disguise the real nature of the actions. When their real nature is looked at, they are found to be thoroughly untenable, the law being clearly settled by *Dawkins* v. *Lord Rokeby*. (1) The actions ought, therefore, to be stayed as frivolous and vexatious, and an abuse of the process of the court: *Castro* v. *Murray*. (2)

Anstie, for the defendant in the third action.

H. Matthews, Q.C. (*Holl* with him), for the plaintiff. There is no precedent for staying such actions as these. The declaration in each shews a good cause of action.

[BLACKBURN, J. But upon the affidavits it appears clearly that the actions are brought solely in respect of official and judicial acts done by the defendants as members of a military court of inquiry, and that there was no conspiracy save the necessary combination between the members of the Court.]

(1) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.

(2) Law Rep. 10 Ex. 213.

It is consistent with the affidavits that the members of the Court agreed together, before entering on the inquiry, to get rid of the plaintiff; and, at all events, it has never been decided that the members of a military court of inquiry, acting maliciously, are privileged as the members of a superior Court would be. [He referred to *Dawkins* v. *Lord Paulet.* (1)]

BLACKBURN, J. I think there is no doubt that we must stay these proceedings. With regard to the substantial merits of the matter, I think, notwithstanding all that Mr. Matthews has said, no one who reads the affidavits can doubt in the slightest degree what they are. The declaration contains a great many ugly words, no doubt; but the substance of it is that these different defendants conspired, combined, and agreed together to make a report to the commander-in-chief, which report is said to be false and malicious, and in consequence of which Colonel Dawkins was put on half-pay. If the matter had stood in that way alone, there would have been a cause of action, because the combining and confederating might have been done as any men might combine and confederate; but then the affidavits of each of the defendants distinctly say—I do not see how they could more distinctly say it—We were members of a court of inquiry. Until we were appointed, we knew nothing of Colonel Dawkins, heard nothing, and cared nothing about him; and the combination which is alleged in the declaration was solely that we, as members of the court of inquiry, having heard the evidence, met and agreed on what we would report, and did report accordingly, in the course of our judicial duty, and in no other way whatsoever. Now, upon that, if that is the true state of the case, we are of opinion that no cause of action can be shewn. Colonel Dawkins does not meet that in the affidavit in reply. He does not pretend that any other representation was made than the report made judicially by the tribunal, or that there is any ground for saying there was any other combination than the necessary combination between the members of a court about to agree in a judgment or report. Upon that I can come to no conclusion, except that the defendants' affidavits are strictly true, and are admitted to be strictly true. Colonel Dawkins,

(1) Law Rep. 5 Q. B. 94.

1876

DAWKINS v. PRINCE EDWARD OF SAXE WEIMAR.

though he may be very wrong-headed to try and proceed with litigation which is utterly hopeless, will not say a word that is not perfectly true.

Then there is a more material thing to consider; and that is, have we, although we see the action is utterly groundless, a right to stop it summarily? I grant that is a jurisdiction which in all cases should be very carefully exercised by the Court. But in *Castro* v. *Murray* (1), which was a stronger case than this, the Court of Exchequer stayed an action against a public officer charging him with not performing a public duty, the action being absolutely without foundation. In the present case, although the declaration is freely sprinkled over with such words as "malice," "fraud," "combination," and the like, the substance of the action is that the defendants held a court of inquiry in obedience to her Majesty's commands, as a military tribunal, and made a report. No action can lie against them for that; *Dawkins* v. *Lord Rokeby* (2), in the House of Lords, which is similar in its circumstances, has determined the precise point. I therefore think we should stay these actions.

MELLOR, J. I am of the same opinion. I wish to say no more about the merits of the case than this. No doubt Colonel Dawkins thinks he has been ill used, and has a very strong opinion that those who have decided against him in these inquiries have done so unfairly. He has brought various actions as the result of that opinion. It is to his credit that when these defendants swear that all they did,—the action they took, and the report they made,—was only in their judicial character, he does not deny it. They say there was no foundation for these proceedings but the judicial acts which they did as constituting a military tribunal; and according to all the authorities and all the dicta to be found in the various cases to which the litigation of Colonel Dawkins has given rise, that tribunal has been clearly shewn to be a tribunal before which a witness or any other person in the course of his duty would be protected on the principle on which jurymen, witnesses, judges of all kinds, are protected. I am clearly of opinion that if this action were not stopped, Colonel Dawkins

(1) Law Rep. 10 Ex. 213. (2) Law Rep. 7 H. L. 744.

would never get to the jury. It is manifest upon the face of the declaration and the affidavits that it would come to a nonsuit. I think we should be allowing the time of the public and the Court to be wasted if we did not interpose and take this course, having the authority to do so, as I consider, fully established by *Castro* v. *Murray* (1), which is a decision not only of the Court of Exchequer, but having the concurrence of all the judges of the Court of Exchequer, for all the judges of the Court of Exchequer were consulted before the opinion of my Brother Bramwell was pronounced.

BLACKBURN, J. It is not a case for costs.

Rule absolute without costs.

Solicitors for plaintiff: *Gascotte, Wadham, & Daw.*

Solicitors for defendants: *Duncan, Murton, & Co.; Walters, Young, & Co.; Vizard, Crowder, & Anstie.*

THE QUEEN, ON THE PROSECUTION OF W. WILLIAMS, APPELLANT, *v.* THE ASSESSMENT COMMITTEE OF BEDMINSTER UNION, RESPONDENTS.

May 3.

Poor-rate—Appeal—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1—"*Failure to obtain Relief.*"

A ratepayer aggrieved by his assessment to the poor-rate, gave notice of objection to the assessment committee, under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1. The committee, considering that a case then pending in a superior court would govern this case, adjourned their decision. The appellant thereupon appealed against the rate to quarter sessions:—

Held, that the appellant had not "failed to obtain relief" from the assessment committee within the above section; and that the quarter sessions had consequently no jurisdiction.

CASE stated by the Bristol quarter sessions, upon an appeal against a poor-rate.

This was an appeal against a poor-rate made for the parish of Bedminster on the 11th of October, 1872, in which the appellant is assessed for a toll-house and tolls upon a certain bridge.

(1) Law Rep. 10 Ex. 213.

1876

THE QUEEN v. BEDMINSTER UNION.

The poor-rate was made in conformity with the valuation list approved of by the respondents.

On the 25th of November, 1872, the appellant served on the overseers of the parish of Bedminster, and also on the respondents, a notice of objection against the valuation list, in accordance with the provisions of the Union Assessment Committee Amendment Act, 1864.

The appellant had appealed against the previous poor-rate, and the appeal had been heard and decided subject to a case reserved for the opinion of the Court of Queen's Bench. The case so reserved was still pending in the Queen's Bench at the time of the meeting of the respondents hereinafter mentioned.

On the 3rd of December, 1872, a meeting of the respondents was held (being their first meeting after the making of the said rate of the 11th of October, 1872), at which the appellant appeared and urged objections to the valuation list.

After the appellant had been heard, the respondents announced that they should not give their decision till the said case for the opinion of the Queen's Bench had been decided, and resolved to adjourn the hearing of the objection until after the decision of the Queen's Bench had been given, and therefore the case was adjourned sine die; and no decision of the Queen's Bench, or of the respondents (the assessment committee), had been given before the hearing of the appeal to quarter sessions.

On the 12th of December, 1872, the appellant served upon the respondents, and the overseers of Bedminster, a notice of appeal to the Bristol quarter sessions.

At the hearing of the appeal, the respondents objected that the appellant had not failed to obtain relief from the respondents, and that the appeal had been brought too soon; but the court of quarter sessions overruled the objection, on the ground that, as the respondents had not given a judgment, the appellant had failed to obtain such relief in the matter as he deemed just, but reserved the point for the opinion of the Court of Queen's Bench.

The question for the opinion of the Court is, whether the appellant was entitled to appeal to the quarter sessions.

Lopes, Q.C., and *March*, for the appellant. The appellant

had, as held by the court of quarter sessions, "failed to obtain relief" from the assessment committee within the meaning of 27 & 28 Vict. c. 39, s. 1 (1), which makes imperative the permissive provisions of 25 & 26 Vict. c. 103, ss. 18, 19.

Bompas (*Herschell, Q.C.*, with him), for the respondents. The object of the provision in 27 & 28 Vict. c. 39, s. 1, is to protect the public from needless expense, and that object would be defeated if the assessment committee could not adjourn its decision in order to await the opinion of a superior Court upon a pending case. The right of appeal against a poor-rate being to the next quarter sessions after the cause of appeal, which now is the failure to obtain relief from the assessment committee, an appellant would, if the adjournment constituted a failure to obtain relief, never be safe in waiting over the adjournment but must appeal at once. The appellant could not have applied for a mandamus to the committee to decide the case. It has already been held that the fact of the assessment committee's not meeting does not constitute a failure to obtain relief: *Reg.* v. *Biggleswade Union.* (2)

Lopes, Q.C., in reply. If the right of appeal can be suspended as contended, the power of distress which by 41 Geo. 3, c. 23, s. 2, subsists, notwithstanding notice of appeal, will operate inconveniently.

[BLACKBURN, J. The power of distress is subject to the liability to repay the amount levied in the event of the rate being quashed.]

Reg. v. *Biggleswade Union* (2) is not like the present case, as there was no meeting at all of the assessment committee. No doubt, in that case, the appellant might have applied for a mandamus to the committee to hold a meeting.

[BLACKBURN, J. So in the present case, unless the committee

(1) 27 & 28 Vict. c. 39, s. 1: "No person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by" the assessment committee of a union under the Union Assessment Committee Act, 1862, "unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just, and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear."

(2) 21 L. T. (N.S.) 494.

1876

THE QUEEN v. BEDMINSTER UNION.

were right in adjourning their decision, a mandamus might have been obtained.]

BLACKBURN, J. The question whether the appellant was entitled to appeal to quarter sessions turns upon whether the appeal was premature or not, and that again turns upon 27 & 28 Vict. c. 39, s. 1, which requires that there shall have been a failure to obtain relief from the assessment committee. *Reg.* v. *Biggleswade Union* (1) seems to me to be directly in point. Having regard to that case, I think it cannot be said that the appellant had not only not obtained relief but had "failed" to obtain it. The question is whether the adjournment constituted a failure to obtain relief. With regard to that question, it is material to observe that, if the committee could not have been required by mandamus to give their decision at once, it must have been because they were right in adjourning their decision. I think, therefore, that the appeal was premature, and that the court of quarter sessions had no jurisdiction.

MELLOR, J. I am of the same opinion. I think that the fact that a similar case was pending in the Queen's Bench, was a reasonable ground for postponing the decision of the assessment committee, and that the appellant was not, by this delay, entitled to appeal to quarter sessions.

Judgment for the respondents.

Solicitors for appellant: *Clarke, Woodcock, & Ryland, for Fussell, Prichard, & Swann, Bristol.*

Solicitors for respondents: *Guscotte, Wadham, & Daw, for O'Donoghue & Anson, Bristol.*

(1) 21 L. T. (N.S.) 494.

STRIBLEY *v.* THE IMPERIAL MARINE INSURANCE COMPANY. 1876 *Feb.* 12.

Marine Insurance—Concealment—Non-communication by Agent of Assured.

In an action on a policy on the ship *Jessie* "at and from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on the 27th of December, 1873, and that the last news the assured, the plaintiff, had of her was a letter from her captain, dated the 9th of January, 1874, and received on the 21st of January, in which the captain said he had had a fine passage out and had commenced loading, but was delayed by bad weather, and would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, and the captain had made a protest on the 3rd of January, but he did not mention the fact in this letter. The plaintiff insured on the 27th of February without communicating to the underwriters the letter of the 9th of January, but through his brokers gave them this information; "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, and avoided the policy.

The judge left to the jury the questions: 1. Was the ship an overdue ship at the time of the insurance? 2. Was any material fact concealed, and, if so, what? 3. Was there any misrepresentation, and, if so, was it fraudulent? The jury answered all the questions in the negative, and a verdict was entered for the plaintiff:—

Held, on a rule for a new trial on the ground of misdirection, and on a motion to enter judgment for the defendants, on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been communicated, and that the plaintiff was responsible for the neglect of the captain in not communicating it, first, that judgment could not be entered for the defendants, as the point as to the anchor had not been distinctly taken at the trial, and, if it had, questions relating to it ought to have been left to the jury; and, secondly, on the authority of *Gladstone* v. *King* (1 M. & S. 35), that the particular average loss was an exception out of the policy, but the innocent non-communication of it by the agent of the assured did not avoid the policy; but that there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of the 9th of January, and the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated.

DECLARATION on two policies on the ship *Jessie;* one for 350*l.* on the freight, and the other for 500*l.* on ship valued at 2000*l.*; alleging a total loss by the perils insured against.

Fourth plea, misrepresentation of material facts.

Fifth plea, concealment.

Joinder of issue.

At the trial before Grove, J., at the sittings in London in

1876

STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.

December, 1875, it appeared that on the 10th of December, 1874, the brig *Jessie* sailed from Falmouth in ballast for Mazagan, a port in Morocco, and arrived there on the 27th. At Mazagan she was anchored in a somewhat open roadstead, for the purpose of having her cargo conveyed on board in lighters. While there a gale sprang up, and on the 1st of January, 1875, she was driven from her anchorage and lost her starboard anchor and chain, the captain making the usual protest. On the 9th of January, the master wrote a letter to the plaintiff, one of the part owners of the vessel, which was received at London on the 24th. This letter appeared to have been mislaid, but the plaintiff, from his recollection of it, said that in it the master stated that he had had a very fine passage out, that he had arrived on the 27th of December, and had begun loading, but had had very bad weather on the coast, and that he did not know when they would finish, but that he would write again. Plaintiff, however, stated positively that the letter said nothing about the vessel having been driven from her anchorage, and having lost her anchor. This letter was the last news which the plaintiff had of the vessel at the time of the insurance. On the 24th of February, the plaintiff having no further news of the *Jessie*, wrote to his London agents, ordering them to insure ship and freight, adding, "I do not know when she was ready to sail. I have not had the sailing letter yet." The agent shewed this letter to the defendants' underwriter, who, on the 26th, signed the two policies on ship and freight, "lost or not lost, at and from Mazagan to port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom." There was evidence that the average time of loading a vessel like the *Jessie* at Mazagan at the same time of year would be between fifteen and twenty days, and twenty-five to thirty days the probable duration of her voyage from Mazagan to England, and that the course of the post from Mazagan was irregular.

It was admitted that the *Jessie*, after leaving Mazagan, was lost by the perils insured against.

The case for the defence was based upon the suppression of the letter of the 9th of January, and evidence was called to shew that it would have induced an underwriter to suspect that some casualty had happened to the vessel.

The learned judge, in summing up the case, told the jury that he did not see that the fact that there was stormy weather on the coast on the 9th of January, and that the ship had lost an anchor, would make much difference as to the risk the ship ran when she afterwards sailed. With regard to the time which, at the date of the insurances, had elapsed since the vessel was heard of, the learned judge said: "A missing ship may be said to be one which is not heard of after the longest ordinary safe time in which the voyage insured is performed. But this is open to many exceptions. . . . I cannot myself see that there is much distinction, as far as the application of the thing goes, between a missing ship which a man may at once charge the underwriter with, or a missing ship which is overdue. A man is not bound, when a ship is a day late, to assume that a ship is an overdue ship, and inform the underwriters of it. It is a matter for the jury to take a reasonable view of it. One would expect, on the other hand, if the time becomes so long that there really is in a reasonable man's mind an apprehension that the ship may be lost, from the time since which she has sailed, that he ought to communicate it. That again would very much depend on the regularity of the passage, and the regularity of the post.

And, after saying that it must be considered whether the delay in the arrival of the vessel was such that the insurer ought to have known that he was imposing on the underwriters a speculative risk, the learned judge left to the jury the questions: First, was the ship an overdue ship at the time of the insurance? secondly, was any material fact concealed, and, if so, what? thirdly, was there any misrepresentation, and, if so, was it fraudulent? The jury answered all these questions in the negative, and a verdict was entered for the plaintiff, with leave for the defendants to move.

Notice of motion to enter the verdict for the defendants on the facts admitted at the trial having been given, and a rule nisi having also been obtained for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence,

C. Russell, Q.C., and *French*, for the defendants. First, the policy being "at and from Mazagan," the loss of the anchor was really a particular average loss within the meaning of the policy,

1876

STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.

but it was never mentioned by the captain in his letter, and for this concealment the plaintiff is responsible. The verdict ought, therefore, to be entered for the defendants, as the Court has sufficient evidence to draw the inference that the loss of the anchor and the tempestuous weather at Mazagan would have influenced the defendants in their estimate of the risk. In *Fitzherbert* v. *Mather* (1) the insurer's correspondent allowed the sailing letter to go several hours after he knew that the ship was lost, and that was held to vacate the policy. *Proudfoot* v. *Montefiore* (2), where the agent neglected to telegraph the loss of the vessel, which would have stopped the insurance, is to the same effect.

[BLACKBURN, J. *Gladstone* v. *King* (3), where it was held that the non-disclosure by the agent without fraud of an accident to the vessel, did not vitiate the policy, but only amounted to an exception of the risk arising from that accident, is an authority against this contention. It appears, also, that the defendants' case was not put in this manner at the trial.]

Secondly, there was a misdirection. The learned judge lays stress upon what was passing in the mind of the plaintiff when he gave the order to insure, and discusses the question whether the ship was then overdue. But this is not the point. What the jury had to consider was, whether the letter would have influenced the underwriter, acting as a reasonable man of business. [They referred to Duer on Insurance, vol. ii., pp. 419–427.]

Aspland (*Day, Q.C.*, and *Benjamin, Q.C.*, with him), for the plaintiff. The question whether there was negligence on the part of the captain in not mentioning the loss of the anchor is one for the jury, and one upon which the plaintiff, from the course which the case took at the trial, was not called upon to give evidence. Secondly, there was no misdirection. It is laid down in *Elton* v. *Larkins* (4) that, generally speaking, it is not necessary that the assured should communicate the hour at which the vessel sailed, but if the time be such as to make the ship a missing ship, then it becomes material.

[BLACKBURN, J. If the direction was that the letter could not be material unless the ship was missing, it was inaccurate.]

(1) 1 T. R. 12.
(2) Law Rep. 2 Q. B. 511.
(3) 1 M. & S. 35.
(4) 5 C. & P. 392; 8 Bing. 198.

1876

STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.

The letter did not shew the time of sailing, but only a delay in loading. [He referred to Arnould on Marine Insurance, 4th ed. vol. i., p. 513.]

BLACKBURN, J. I think it is impossible to say that the verdict can be entered for the defendants upon the point now taken by them. This point is that, inasmuch as the captain of the *Jessie* did not in his letter to the plaintiff mention the fact that she had lost her anchor in the storm on the 1st of January, and consequently the plaintiff effected his insurance without disclosing this fact, the policy must be taken to be void; for it was a policy, lost or not lost, at and from Mazagan, so that the loss of the anchor was a loss within the policy, and the underwriters ought to have been informed of it. It is admitted that this point was not taken at the trial, but it is contended that the defendants, upon proof of this non-disclosure, are entitled to have the verdict entered in their favour. The cases relied upon are *Proudfoot* v. *Montefiore* (1) and *Fitzherbert* v. *Mather* (2), and these cases undoubtedly shew that if an agent purposely keeps back information from his principal in order that he may effect an insurance, the principal is responsible for the misrepresentation, and the policy is void. It is unnecessary to say whether these cases must be taken to have decided that where the agent does not act fraudulently, but is only guilty of negligence in not disclosing what he knows, that this will also avoid the policy. But there is also the case of *Gladstone* v. *King* (3), where it was held that where the captain, without fraud, neglects to communicate to the owner damage done to the vessel, that this damage is an implied exception out of the policy.

Taking these cases together, it certainly cannot be assumed that any concealment from the owner by the captain of a damage to the vessel, which might be claimed for as an average loss, would avoid the policy. I must confess that I much prefer the doctrine in Phillips on Insurance, § 564, that in order to avoid the policy, the misrepresentation or concealment by the master must be fraudulent. We certainly cannot enter the verdict for the defendants, as, if the point had been taken at the trial, several questions would

(1) Law Rep. 2 Q. B. 511. (2) 1 T. R. 12.
(3) 1 M. & S. 35.

1876

STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.

have arisen as to the extent to which the accident was a fact material to be communicated, and as to how far the master was guilty of negligence in not communicating it. Upon another trial, the matter may, if necessary, be investigated.

We come now to the second question, whether there was misdirection, or whether the verdict was against the weight of evidence. I am inclined to think that the rule ought to be made absolute on both grounds. The plaintiff appears to have received a letter from the captain, dated the 9th of January, which reached him on the 24th. This letter was said to have been lost, but the plaintiff gave its contents from memory, and according to him the captain said that he had a fine passage out, that he had commenced loading, but that he had very bad weather, and did not know when he should finish, but that he would write again. Then the plaintiff, on the 24th of February, a month after the receipt of the letter, insures his ship without mentioning the letter.

The question was, whether this letter, and the time which had elapsed since it was received, ought to have been communicated to the underwriter. I think the test is, whether a fair and reasonable underwriter, looking at this letter and the circumstances under which it was received, would say, "I think this is a speculative risk, which I will either decline to take, or, if I do take, it shall be at a greater premium than is usual."

Now, I rather think that what the learned judge left to the jury was simply the question whether the ship was what is called a "missing ship," so that there was a presumption that she was lost when the insurance was effected. I think this was not the real question. The real question was, whether the contents of the letter, the dates at which it was written and received, and the time which had elapsed since anything had been heard of the vessel, were not facts which might properly have influenced the underwriter in accepting the risk. If, however, the question was in fact, left to the jury, then I think that this verdict was so far unsatisfactory that there ought to be a new trial. In either view I think the rule for a new trial ought to be made absolute.

LUSH, J. The first question raised in this case is one of great importance, and upon which there is no authority exactly in point.

It appears that during her stay at Mazagan, the *Jessie* was driven from her anchorage by a tempest and lost an anchor, and that the master in writing to his owners made no mention of this fact. The ship got back into the roadstead, completed her loading, and started upon her homeward voyage, and in the course of this voyage was lost. The question for our consideration is, are the underwriters liable, or are we bound to say that because the loss of the anchor was not communicated to them that therefore no claim can be made upon them? The latter proposition is so startling a one that I should be most unwilling to follow it unless I were bound by authority. It would no doubt be obviously unjust to make the underwriters liable for the loss of the anchor, for this was a loss which was not in the contemplation of either the owners or the underwriters, but it is a very different question whether they should not be liable for the subsequent loss of the ship. I quite agree with the authorities which establish that where the master of the ship, or the agent or correspondent of the owner, wilfully or by culpable negligence withholds any fact material to the risk, the owner, in making an insurance, is identified with his agent and liable for his default. But there is the further question, whether, in such a case, the policy is wholly void or only void pro tanto. In the two cases of *Fitzherbert* v. *Mather* (1) and *Proudfoot* v. *Montefiore* (2) the claim was for a total loss, and in each case the agent, in order that his principal might in the meantime effect an insurance, wilfully kept back information of the same loss in respect of which the claim was afterwards made. In neither case did the point now before us arise, but in the intermediate case of *Gladstone* v. *King* (3) a similar point arose. In that case there was no fraud on the part of the agent, at any rate there was no finding of fraud, but he did not communicate to the owner the particulars of an accident which afterwards resulted in a partial loss of the vessel. The Court held, in an action to recover the amount of this same partial loss, that the cause of the damage not having been communicated, the damage was impliedly excepted from the policy, but they did not hold the policy to be void, for they recognised the right of the assured to recover back his premium. Now, whether this case will hereafter be maintained

(1) 1 T. R. 12. (2) Law Rep. 2 Q. B. 511.
(3) 1 M. & S. 35.

1876

STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.

or not I cannot say, but it may certainly, I think, be urged that such a claim was not in the contemplation of either party. In the present case no such observation can be made, for the loss of the anchor must have been replaced, and the loss which afterwards occurred was unconnected with the previous loss of the anchor, and was a loss which both parties intended to assure. If the present action had been simply to recover the loss of the anchor I should have been quite prepared to hold, following *Gladstone* v. *King* (1), that the loss was not recoverable under the policy. But I think that as the claim is not in respect of the anchor, but on a distinct and subsequent loss, the policy itself is not void, for there is no evidence of fraud or even of negligence in not mentioning the accident. I think, therefore, that the defendants cannot have the verdict entered in their favour on this point. Upon the other point, I agree with my Brother Blackburn that the letter was one which might easily have influenced the underwriter in considering whether he should accept the risk, and the question whether it would so have influenced a reasonable underwriter ought to have been left to the jury. It does not seem to me that the question was placed clearly before them, and I think that the case ought to go down for a new trial.

QUAIN, J. I am of the same opinion. With regard to the first point, all that we need say is, that it was not taken at the trial. If it had been, it might have been necessary to ask the jury questions as to how far the communication was material, and how far it was the duty of the plaintiff to inform the defendants of it.

With regard to the other point, there is some difficulty in ascertaining what was the exact direction which was given by the learned judge. But I do not find that the jury were asked to consider whether, under the circumstances, the non-disclosure of the letter was the concealment of a material fact likely to influence the mind of an ordinary underwriter in fixing the premium. The verdict seems to have proceeded on an erroneous ground altogether, namely, whether at the time of the insurance the *Jessie* was an overdue or missing ship. I do not think this can be considered as the test whether the communication was material or not; the question was, whether the letter was part of the circum-

(1) 1 M. & S. 35.

stances relating to the ship which ought to have been submitted to the underwriter, that he might take it into account in accepting the insurance and in fixing the premium.

Motion refused, rule absolute for a new trial.

Solicitor for plaintiff: *McDiarmid.*

Solicitors for defendants: *Argles & Rawlins.*

HARRIS *v.* THE GREAT WESTERN RAILWAY COMPANY.

May 30.

Deposit for safe Custody—Railway Company—Conditions on Back of Cloak-room Ticket—Condition exempting from Responsibility for Goods above a certain Value.

The plaintiff having been a passenger by the defendant's railway, her luggage (consisting of two packages) was deposited with a clerk of the defendants, at their cloak-room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed, in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to, any package beyond the value of 5*l.*, unless at the time of the delivery of such package the true value and nature thereof . . . . shall have been declared, ... and a sum at the rate of 1*d.* per pound sterling . . . be paid . . . in addition to the before-mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak room." The value of each package was more than 5*l.*, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the defendants' servants into the cloak-room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the defendants' servants. On these facts, the Court having power to draw inferences:—

Held, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket.

Held, also, by Blackburn and Mellor, JJ., that the conditions were applicable to the loss, and protected the defendants, although the luggage was not deposited in the cloak-room.

But by Lush, J., that the contract was to warehouse the luggage in the cloak-room, and that the conditions only protected the defendants as to a deposit in the cloak-room.

Henderson v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) distinguished.

ACTION to recover the value of passenger's luggage delivered to the defendants at their cloak-room.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

At the trial before Pollock, B., without a jury, a verdict was found for the plaintiff for 60*l.*, with leave to move to enter judgment for the defendants, the Court to have power to draw inferences of fact.

The facts are fully stated in the judgment of Blackburn, J.

April 26. *Thesiger, Q.C.*, and *Digby*, for the defendants. The conditions on the back of the ticket were part of the contract: *Henderson* v. *Stevenson* (1); *Van Toll* v. *South Eastern Ry. Co.* (2); *York, Newcastle, and Berwick Ry. Co.* v. *Crisp* (3); *Stewart* v. *London and North Western Ry. Co.* (4); *Zunz* v. *South Eastern Ry. Co.* (5); *Johnson* v. *Great Southern and Western Ry. Co.* (6); *Lewis* v. *McKee.* (7) Those cases shew that express assent to the conditions was not necessary, and that the reference on the face of the contract, with the facts in evidence in this case, was sufficient to make the conditions part of the contract. The conditions, being part of the contract, protect the defendants from this loss: *Van Toll* v. *South Eastern Ry. Co.* (2)

Sir H. James, Q.C., and *Masterman*, for the plaintiff. The conditions on the back of the ticket were not part of the contract. *Henderson* v. *Stevenson* (1) is a direct authority on this point. But even if they were, they do not protect the defendants; in the first place, because the contract was that the luggage should be put into the cloak-room, and it never was put there; in the second place, because the conditions cannot exempt the defendants from responsibility for gross negligence: *Birkett* v. *Willan* (8); Hodges on Railways, 5th ed. p. 546, citing *Wyld* v. *Pickford.* (9)

[BLACKBURN, J. *Hinton* v. *Dibbin* (10) is against that contention.]

Hinton v. *Dibbin* (10) was a decision upon 11 Geo. 4 & 1 Wm. 4, c. 68, and does not diminish the weight of *Wyld* v. *Pickford* (9) as an authority upon conditions apart from statute.

[BLACKBURN, J. In *Hinton* v. *Dibbin* (10) the effect of conditions apart from the statute was also considered.]

(1) Law Rep. 2 H. L., Sc. 470.
(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.
(3) 14 Q. B. 527; 23 L. J. (C.P.) 125.
(4) 3 H. & C. 135; 33 L. J. (Ex.) 199.
(5) Law Rep. 4 Q. B. 539.
(6) Ir. Rep. 9 C. L. 108.
(7) Law Rep. 4 Ex. 58.
(8) 2 B. & Ald. 356.
(9) 8 M. & W. 443.
(10) 2 Q. B. 646.

Gill v. *Manchester Ry. Co.* (1), and *D'Arc* v. *London and North Western Ry. Co.* (2), the latter following *Robinson* v. *Great Western Ry. Co.* (3), shew that the defendants are responsible, notwithstanding the conditions.

Digby, was heard in reply, and referred to *Gallin* v. *London and North Western Ry. Co.* (4) and *Peek* v. *North Staffordshire Ry. Co.* (5)

Cur. adv. vult.

May 30. The following judgments were delivered :—

LUSH, J. I agree with my learned Brothers in holding, and for the same reasons, that the goods in question were delivered to and were accepted by the company, upon the terms and conditions mentioned in the ticket, and that the contract of the company was therefore qualified by those conditions. But upon the second question, namely, whether, under the circumstances disclosed in the case, the company can avail themselves of the protection intended by the first condition, I have arrived at a different conclusion.

I think the condition is not applicable to the kind of custody in which these packages were kept. Of course, if a package intrusted to a warehouseman is restored to the owner in the same condition as it was when he delivered it, it matters not to him where and how it has been kept. The warehouseman in that case will have fulfilled his contract, and no cause of complaint arises though he may not have kept it in the place where he contracted to keep it. It is only when the package has been lost or damaged that it becomes material to inquire where it was deposited and how the loss or damage was occasioned, in order to ascertain whether it was attributable to any negligence of the warehouseman, for he is not an insurer, and is only responsible for loss or damage happening through his default. His contract is, to take due and reasonable care of the goods intrusted to him, which includes the keeping them in a suitable place where they will not be exposed to depredation, or to damage by weather, breakage, or otherwise. If, not-

(1) Law Rep. 8 Q. B. 186.
(2) Law Rep. 9 C. P. 325.
(3) 35 L. J. (C.P.) 123.
(4) Law Rep. 10 Q. B. 212.
(5) 10 H. L. C. 473 ; 32 L. J. (Q.B.) 241.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

withstanding such due and reasonable care the goods are stolen, burnt, or damaged, he is not responsible; but if these casualties happen through his negligence he is.

The parcels in question being of comparatively small dimensions and weight, and therefore easily removable, ought to have been kept out of the way of thieves. If either had happened to be of less value than 5*l.*, and so not within the first condition, there would, I apprehend, have been no doubt in the mind of any one that the company would have been liable to make good the loss; and the ground of their liability would have been the not keeping it in a reasonably safe place of deposit. They would have been told that if they chose to keep such goods unguarded in a place of public resort, they did so at their own risk and not at the risk of the owner. If they had kept them in the cloak-room, and they had been stolen from thence by reason of the door being carelessly left open, or if they had been damaged by any carelessness of their servants, in that case also, the company would have been liable, but if, without any fault on the part of their servants, they had been stolen, burnt, or injured, the loss would have fallen on the owner.

The condition must, in my opinion, be read as intended to protect the company in cases where they would otherwise have been responsible by reason of the negligence of their servants in the keeping and management of the warehouse, and not to relieve them from the duty of warehousing at all. What the owner pays for is such an amount of security as a reasonably safe warehouse affords, and not the mere permission to leave the goods on the company's premises. In other words, the owner who does not insure takes upon himself a warehouse risk, the risk of his goods being stolen, burnt, or damaged, while there. The argument on the part of the company casts on him a risk which no one contemplates when he pays for warehousing, and which would excuse the company not merely for want of care in the keeping, but for actual exposure of the goods in the open air, not only to every passing thief, but to damage by rain, or breakage, or otherwise, if this was done by their servants in neglect of their duty—in fact they would be irresponsible though no precaution whatever were taken to secure the safety of the goods.

I cannot think that this is the true meaning of the condition, because it would be utterly inconsistent with the relation of bailee for reward and bailor, and, in my view, equally inconsistent with the terms of the ticket itself.

The ticket is headed, "Luggage and cloak office." This, it is true, may merely be meant to indicate the place where it is issued. But it goes on to state that the sum charged is for "warehousing." It notifies that the company will not be responsible, under any circumstances, for loss of, or injury to, articles, "except left in the cloak-room," that they will not deliver up luggage except to persons producing the ticket; and, lastly, that "the cloak-room is only open on Sundays at such times as the trains arrive at, and depart from, the station." What is this but a plain intimation that the goods are to be deposited in the cloak-room? Why, otherwise, should the depositor be informed at what hours the cloak-room is open on Sunday?

The inference is to my mind irresistible that the company, by the very terms of the ticket, engage to keep the goods in the cloak-room; and, that being so, the condition in question must be read as applying to a cloak-room custody, and as if the words had been that the company will not be responsible if they are stolen from the cloak-room, or burnt, or delivered to the wrong person, or damaged while there, although this may have been caused by the negligence of their servants. As the goods were never in the cloak-room, they were not subject to the condition. It seems needless to say that the loss is directly attributable to this breach of contract, for, if the articles had been in the cloak-room, the thief could not have got at them so as to pass them off as his own luggage.

The case closely resembles, I think, *Lyon* v. *Mells*. (1) There a lighterman, who had given notice that he would not be answerable for any loss or damage to any cargo put on board his lighter, unless such loss or damage should be occasioned by want of ordinary care and diligence in the master or crew, and then only to the extent of 10 per cent. upon the loss or damage, was held not entitled to any protection where the damage was caused by the unseaworthiness of the lighter, a breach of the condition

(1) 5 East, 428.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

implied by law. The notice was construed as applicable solely to goods carried in a seaworthy vessel.

For these reasons I am of opinion that our judgment ought to be for the plaintiff.

MELLOR, J. In this case the facts and evidence, so far as they appeared on the trial before Pollock, B., without a jury, are sufficiently set out in the judgment about to be delivered by my Brother Blackburn, and I think it unnecessary to state them.

On the argument, two questions were made; first, whether the plaintiff, under the circumstances, was bound by the terms of the ticket, which was delivered to her agent on his depositing the portmanteau and box in the custody of the defendants' servants in the vestibule to the cloak and luggage room; secondly, whether, on the true construction of the terms of the ticket, the company were relieved from liability by the fact, that on the deposit of the portmanteau and box no declaration was made of the true value and nature of the articles or property therein, as required by the second condition, each article being above the value of 5*l*.

The ticket in question was as underneath:—

"G. 56 Great Western Railway.
"No. 999 Paddington Station.
"(259) Luggage and Cloak Office.
"Friday the 29th of May, 1874.

Articles.	Amount. s.	d.
1 Portmanteau		2
1 Box		2
Insurance on £ _____ @ 1*d.* per £		
Additional charge for _____ days @ 1*d.* each article per day . . .		
Total .		

"Left in the name of _____
and subject to the conditions on the other side.
"J. L., *Clerk.*

"This ticket to be given up when the Luggage is taken away."

"Conditions. [On the back of the ticket.]

"N.B.—The Great Western Railway Company appoint that the undermentioned sums be paid them for warehousing passengers' luggage, which has been, or which is about to be, conveyed on their railways, viz.:—

"For any period not exceeding three days, twopence for each package; and after three days, one penny additional for each package per day, or part of a day.

"And they hereby give notice that they will not be answerable for loss of, or injury to, any such package beyond the value of five pounds, unless at the time of the delivery of such package to them the true value and nature thereof, and of the article or articles, or property therein, shall have been declared by the person delivering the same, and a sum at the rate of one penny per pound sterling of the declared value be paid for such package for each day, or part of a day, for which the same shall be left, in addition to the before-mentioned ordinary warehouse charges.

"Every person depositing luggage will be furnished with a receipt, stating the number and description of the articles deposited, which receipt must be given up to the companies' servants upon their delivery of the articles thereon described; and the companies give notice that they will not deliver up luggage, except to persons producing the proper receipt for the respective articles claimed, which delivery shall acquit the companies from all further claims in respect thereof.

"The company will not be responsible, under any circumstances, for loss of, or injury to, articles, except left in the cloak-room.

"The company's servants are prohibited, under pain of instant dismissal, from receiving fees or gratuities, under any pretence whatever.

"On Sundays the cloak-room is only open at such times as the trains arrive and depart from their stations."

The counsel for the plaintiff very much relied on the authority of the case of *Henderson* v. *Stevenson* (1) in the House of Lords, and contended that the principle to be deduced from that case governed the present, and unless the present case can be distinguished, we are undoubtedly bound to follow that decision.

(1) Law Rep. 2 H.L., Sc. 470.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

I do not intend to say that we are bound by all the dicta which fell from the learned Lords who delivered judgment seriatim in that case, but we are bound by the ratio decidendi to be collected from those separate judgments. In that case the Lords were judges both of law and of fact, but, by the effect of the reservations in this case, we are in the same position, and acting in the capacity of judges we declare the law, and of jurymen we draw inferences from the facts. In the report of the case of *Henderson* v. *Stevenson* (1), the headnote, with substantial accuracy, represents the facts as follows:—"A ticket having on its face only the words 'Dublin and Whitehaven' was given to a passenger, who, without looking at it, paid for it and went on board. Having lost all his luggage, he brought an action against the company for its loss. Defence of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause." In carefully considering the judgments in that case, we find the Lord Chancellor thus expressing himself: "There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the respondent's attention to what was printed on the back." And further on he says: "The present is a case in which there was no reference whatever upon the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything dehors." And, referring to the case of *Stewart* v. *North Western Ry. Co.* (2), he declined to express any opinion upon it beyond saying it did not govern the case then under consideration.

It is true that Lord Chelmsford intimated an opinion to the effect that "The moment the money for the passage is paid and accepted their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid."

Lord Hatherley's opinion seems to be in accord with Lord Chelmsford's as to the effect of the ticket being merely in the nature of a voucher that the passage-money has been paid.

(1) Law Rep. 2 H. L., Sc. 470. (2) 3 H. & C. 135; 33 L. J. (Ex.) 199.

10 Jur. N.S. 805

Lord O'Hagan's opinion is certainly more in conformity with the reasons assigned by the Lord Chancellor, and he said "that the receipt of a ticket under such circumstances, and with such an indorsement as we have before us, is not shewn by the authorities cited at the Bar to furnish, per se, sufficient evidence of such assent or knowledge."

Doubtless some of the observations which fell from Lord Chelmsford and Lord Hatherley may appear to have a bearing beyond the precise facts of that case, but I cannot help thinking that they were only intended to refer to the peculiar circumstances which there appeared, and the description of the ticket upon which the matter arose.

In the present case the journey of the plaintiff was complete and the responsibility of the company as carriers had ceased, but they had, for the convenience of the travelling public, established a luggage and cloak office, where passengers encumbered with luggage might, for their own convenience, deposit it on certain prescribed payments and on certain conditions both as to time of warehousing and re-delivery. Primâ facie, therefore, and as a matter of common sense, the person depositing the luggage would expect to do it on some special terms and conditions as to remuneration and care. Accordingly, on the luggage being brought to the luggage and cloak office to be deposited, and a payment of so much per article being demanded for the temporary accommodation required by the passenger, and the number of the articles being ascertained, an entry was made in the presence of the depositor on a printed ticket, which is not only a statement of the fees to be paid to the company, but is also a voucher for the re-delivery of the articles deposited, and a statement of the conditions upon which alone the company will accept the deposit.

A fac-simile of the ticket, and of all the matters contained on it, are set out above, and it appears that, in order to render the ticket of a convenient size, the paper referred to was printed on both sides, the first side specifying the articles as kept in the name of , and "subject to the conditions on the other side," followed by the initials of the clerk, and then, underneath, are printed the words, "this ticket to be given up when the luggage is taken away," and, on the other side, in conformity with the

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

notice to that effect contained on the first side, are stated the conditions, and a notification of the times at which the cloak-room is open for receipt and delivery of packages.

The ticket in this case much resembles a half-sheet of paper, upon which the writer, having filled up one side, turns over the page and continues the matter on the other.

The depositor in the present case not only was aware that the paper ticket so filled up and handed to him, in exchange for the portmanteau and box, contained something relating to the deposit, but believed that it contained conditions. Drawing inferences from his evidence, I come to the conclusion that he knew that the ticket contained terms and conditions in which the deposit was made, although he did not choose to read them so as to become aware of the exact contents. Under such circumstances, it would indeed be strange to hold that he was not bound by the terms and conditions of the ticket, which he accepted without objection. I come, therefore, to the conclusion that he cannot be permitted to excuse the plaintiff from the obligation of the terms of the ticket, on any pretext that he did not actually read them so as to become aware of the actual conditions.

I am further of opinion that the plaintiff was bound by the conduct of her agent, and is precluded, under the circumstances, from setting up any defence that she did not deposit the luggage on the terms which the ticket so handed to her agent contained, or assent thereto.

On the second question I feel considerable hesitation. Assuming that the plaintiff assented, or is precluded from objecting that the deposit of the luggage was not made on the terms and conditions of the ticket in question, then arises the question whether or not, on the true construction of the terms and conditions of the ticket, the company undertake simply to warehouse the luggage for the convenience of the passengers, using the machinery of the luggage and cloak office as the office and place of business in which the matters relating to the deposit must be made and the ticket business transacted, or did they undertake to warehouse the articles left in their charge in the actual luggage and cloak office, so as to give to the person making the deposit, and paying the prescribed sum, the additional security which the actual deposit within the

luggage and cloak office would afford? And it is to be observed that, the luggage and cloak office being locked up, except during the arrival and departure of trains, when a servant or servants would be present, and would probably prevent the access of strangers or thieves to the articles deposited, it may be said that the depositor might be willing to pay for the accommodation offered, if accompanied by the additional security afforded by the cloak-room, and yet not be willing to assent to the conditions if the company were only to accept the responsibility of warehousing them generally.

Now, it is to be observed that the conditions on the face of them appear to apply in terms to "the warehousing passengers' luggage;" and, at the end of the condition upon which the defence upon this point rests, viz. the failure to declare the value and nature of the articles in question on the ground that they were beyond the value of 5*l.*, the sum, which by the condition was required to be paid on the value declared, is described to be "in addition to the before-mentioned *ordinary warehouse charges.*"

It was, however, contended that in the fourth condition it is said, the company will not be responsible for the loss of, or injury to, articles "except left in the cloak-room," and that those articles not being left in the "cloak-room," the conditions do not apply to the case. I cannot, however, but think that the true effect of that condition with the others really is to notify that, unless the articles have gone through the process of being ascertained, counted, and the fees duly paid at the luggage and cloak office, the company will not be responsible at all.

I have come, therefore, to the conclusion that the limit of the company's undertaking was simply to warehouse the articles deposited on the conditions specified, and that they did not lose the benefit and protection of the conditions of the ticket, because the articles in question were not actually warehoused in the cloak room but were stolen from the vestibule.

I think, therefore, that the defendants are entitled to our judgment on both points.

BLACKBURN, J. The plaintiff was a passenger by defendants' railway, and arrived at the Paddington station in London with a

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

portmanteau and a box, which she wished to leave in the custody of the defendants. Mr. Richard Harris, who acted for her, paid to the clerk of the defendants, at their cloak-room, four pence, and received from him a ticket, on the terms of which much depends. He left the portmanteau and box in the custody of the defendants' servants; they put on them cloak-room labels, and left them without any other protection in the vestibule. A plan was admitted on the trial, and produced before us on the argument, which shewed the position of the cloak room and the vestibule. The vestibule is a place to which passengers have access, and in which luggage in the custody of passengers may be placed by them. A thief, taking advantage of this, either removed or concealed the cloak-room tickets, treated the luggage as his own, and with an extreme of cool impudence, applied to the defendants' policeman on duty to assist in removing them, which the policeman did. The thief was subsequently convicted, but only part of the property was recovered. Each package of Miss Harris's luggage was above the value of 5*l.*, and her loss was 60*l.*, and for this the action was brought.

At the trial, before my Brother Pollock without a jury, the above facts were admitted, and neither then nor on the argument before us was it disputed that the loss was occasioned in consequence of the servants of the defendants having failed to exercise proper care in and about the safe keeping of the luggage thus left with them. The defence was rested on the ground that the plaintiff was bound by the terms of the ticket, which, it was said, prevented the plaintiff from recovering for any loss to a package above the value of 5*l.* unless the value was declared and insurance paid at the rate of one penny per pound per day.

Mr. Richard Harris was called as a witness, and his evidence, as taken down on the judge's notes, was as follows:—"When I left the box and portmanteau my attention was not called to the conditions on the ticket, nor was I aware of them." Cross-examined: "I have been in the habit of travelling for many years, and during the last three years have left parcels at this cloak room perhaps once a month when I came to town on business. I believe I have always, on those occasions, received a ticket similar to this. I was not aware of the conditions. I

have probably seen conditions on the cloak-room tickets of other English railways. I believe I have seen printing on both sides of the Great Western tickets without reading them. I knew that I must deliver up the ticket when I wanted the articles deposited. I have seen the words on the ticket, 'This ticket to be given up when the luggage is taken away.'" Question: "Were you not aware it contained some conditions with reference to the deposit of the luggage although you were not aware what they were?" Answer: "I believed that there were some conditions." Re-examined: "My attention was not called to any condition, and I never gave it a thought. When I say I have always received a ticket similar to this I mean similar in general appearance." It was then admitted that the tickets used by defendants have for several years been the same as the ticket produced.

The learned judge found for the plaintiff, 60*l.*, reserving leave to move to enter judgment for the defendants, the Court to draw inferences of fact.

The ticket (or rather a fac-simile of it) was produced on the argument of the motion before us.

Two questions were discussed. First, whether the plaintiff was, under the circumstances, bound by the terms of the ticket. Second, whether, on the true construction of those terms, they protected the defendants from liability for the loss, arising as this did. If either question is decided in favour of the plaintiff, the verdict and judgment for her must stand. I have, however, come to the conclusion that both questions should be answered in favour of the defendants, who are therefore, in my opinion, entitled to judgment.

I will, first, give my reasons for thinking that the plaintiff was, under the circumstances, bound by the terms of the ticket.

The materials from which we are to draw inferences are, first, the evidence of Mr. Harris, which I accept as true, and do so the more readily because he describes himself as being in a state of imperfect information, which I think probably very common; and, secondly, the ticket which was produced before us. The appearance of the face of the ticket is material in deciding this first question. The conditions on the back only become material in deciding the second question. It was a paper about five and a

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

half inches square, bearing the ordinary appearance of having been taken out of a book in which a counterfoil was left. The printed part was in clear, fair-sized type, such as any one might easily read. My Brother Mellor has, in his judgment, sufficiently stated its contents.

On the law governing this case, we were referred to the case of *Henderson* v. *Stevenson* (1), decided by the House of Lords sitting in appeal on a Scotch case, but on a subject in respect to which the law of Scotland and the law of England are one and the same. The Lords were there, in consequence of the forms of Scotch law, judges of fact, and we, in this case, are, in consequence of the manner in which the point is reserved, also judges of fact. I think that all inferior tribunals, and the Lords themselves on any subsequent occasion, are not only required to treat this decision with great respect as an authority, but are bound to follow it as a decision. If it is thought wrong, it must be altered by the legislature. And I make no distinction between the decision on the principle of law, as applicable to this case, and the principle on which the Lords drew the inference from the facts. I think the same inference should be drawn from the same facts, or facts which are in substance the same. But I think this is only true so far as the decision, or rather the ratio decidendi, of the House goes; and that opinions expressed by one or more of the Lords in delivering their opinions, if not part of the decision, are to be treated with great respect as authorities, but are not binding either on the House itself on a future occasion or on any other Court.

This, I think, was decided in *Mersey Docks* v. *Gibbs*. (2) Lord Cottenham had, in *Duncan* v. *Findlater* (3), enunciated a doctrine which was in direct conflict with the opinion delivered by the judges in *Mersey Docks* v. *Gibbs*. (2) The judges, after mentioning what Lord Cottenham's opinion was, say (4): "This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case, but, not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down." Lord Cranworth and

(1) Law Rep. 2 H. L., Sc. 470.
(2) 11 H. L. C. 686.
(3) 6 Cl. & F. 894.
(4) 11 H. L. C. at p. 720.

Lord Wensleydale did not think it necessary to enter into details, and merely expressed their concurrence in the opinion delivered by the judges, thus deciding in contradiction to what Lord Cottenham had laid down in *Duncan* v. *Findlater* (1), without expressly saying anything about it. But Lord Westbury (2) thought it desirable "to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan* v. *Findlater*." (1) He then proceeds to express dissent from Lord Cottenham, and finally adds: "My Lords, the learned judges observed, and with very great correctness, that it is not every thing that falls from a noble and learned lord in advising the House which is to be considered as the opinion of the House."

I call attention to this matter particularly, because I not only think myself bound to obey the decision of the House in *Henderson* v. *Stevenson* (3), but I also think (if I rightly understand the judgment) that, though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognised by the courts; and therefore I not only obey that decision, but acquiesce in it. But there are expressions used by the different Lords which seem to express opinions which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it.

On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord Holt in *Coggs* v. *Bernard* (4), the bailee (unless he is one

(1) 6 Cl. & F. 894.
(2) 11 H. L. C. at pp. 732–733.
(3) Law Rep. 2 H. L., Sc. 470.
(4) 2 Ld. Raym. 909; 1 Sm. L. C. 188, 7th Edit.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

who has the responsibilities of a public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury: the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman* v. *Cooke* (1), that is, if he "means his representation to be acted upon, and it is acted upon accordingly: or if, whatever a man's real intentions may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true." And accordingly, in *Allan* v. *Mawson* (2), where the plaintiff had taken an instrument which on a cursory view appeared to be a draft on Sir John Perring and others, bankers, London, but with the word "at" in very small letters enclosed in the hook of the S of the Sir, so as to make it at least doubtful whether the instrument did not purport to be a promissory note, Gibbs, C.J., asked the jury whether the word "at" was so inserted for the purpose of deception, for if so, it was to be struck out, and the instrument was a bill of exchange in fact. A

(1) 2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119. (2) 4 Camp. 115.

similar decision, mentioned by Lord Hardwicke, in 2 Atk. 32, had been come to by Lord Macclesfield in a case where a man gave a girl a promissory note for "20*l.* value received, which I promise *never* to pay," and the word "never" was rejected. Both of those cases seem to me to proceed on the ground that in neither case could the defendant, as a reasonable man, believe that the other party had read the words inserted for the purpose of deceit, or that the other party meant to represent to the defendant that he had done so.

The decision in *Henderson* v. *Stevenson* (1) seems to me to proceed on the same principle, but to carry it one step further. There was no fraud or intentional deception found in that case, as there had been in the two just cited, but there was nothing to shew that the steamboat company, who were the defendants in that case, or those who represented them, as reasonable men, would believe, from the conduct of the passenger, that he had represented to them that he had read or looked at the back of the ticket, and in point of fact he had not.

Lord Cairns, L.C., says: "On the face of this ticket there are letters indicating the name of the steamboat company, and the words 'Dublin to Whitehaven.' This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him." He then points out that there was no reference on the face of the ticket to that which was printed on the back, and that the evidence was that the passenger had not, in fact, read what was on the back of the ticket, and proceeds: "The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without anything dehors. Those who were satisfied to hand to the passenger such a contract, complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to

(1) Law Rep. 2 H. L., Sc. 470.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

me, to have made that contract, and that contract only, with the passenger; and the passenger, on his receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him." It certainly seems to me that this is, in other words, to say that, though the ticket was the contract, the passenger receiving such a ticket had not so conducted himself as to justify the steam packet company, or their servants, as reasonable men, in thinking that he had read, or ought to have read, or otherwise made himself acquainted with, what was on the back of the ticket, and consequently that the passenger was not precluded from shewing that, in fact, he knew nothing of what was on the back. But, in the present case, the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and, that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted. It is true that Lord Chelmsford and Lord Hatherley, in *Henderson* v. *Stevenson* (1), are reported to have thrown out an opinion that the contract was complete on the payment of the passage money, and that the ticket was but a receipt for that money. This certainly is no part of the decision of the House, and, indeed, seems to be contrary to the view taken by the Lord Chancellor. I will not inquire at present how far what was suggested by those noble lords may or may not be just when applied to a passenger going by a public conveyance, which was the case before the House, but is not the case before us, and on which, therefore, we are not required to express an opinion; but, with every respect for their authority, I

(1) Law Rep. 2 H. L., Sc. 470.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

cannot think it applicable to the case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket which he knew was to be given up when the goods were demanded back. I think it would be as reasonable to allow the holder of a bill of lading, or of a wharfinger's receipt, or a dock warrant, to say that he thought this was only a receipt for the goods, and not a contract as to their carriage or custody. This, I think, cannot be allowed. I will not now inquire whether the question, whether the contract has been reduced into writing, is one of those preliminary questions which, according to *Bartlett* v. *Smith* (1), are to be decided by the judge, or one of those to be decided by the jury. I did express an opinion in *Peek* v. *North Staffordshire Ry. Co.* (2) that it was for the judge. As we are both judges and jurors in this case, it is not necessary to inquire in which capacity we decide the question.

The defendants, as a railway company, are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this.

It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants, as reasonable men, in believing that the person bringing the goods and paying the money, as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket and to induce them to receive the goods on those terms? I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority

(1) 11 M. & W. 483.

(2) 10 H. L. C. 473, at pp. 517–518; 32 L. J. (Q.B.) 241, at p. 253.

1876

HARRIS v. GREAT WESTERN RAILWAY CO.

was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody: see *Belfast and Ballymena Railway* v. *Keys.* (1) I think, as at present advised, the proper direction to a jury in such a case as this would be that, if they believed these undisputed facts, they ought to find that the terms were binding on the plaintiff. This we need not decide, but where I am to act as both judge and juror I have no hesitation in so finding.

The second question which arises depends entirely on the true construction of the conditions.

If I could agree with my Brother Lush that the meaning of the contract is that the defendants are to place the luggage in some separate warehouse to which none but the defendants or their servants had access, so that the placing them in the vestibule was a breach of contract, I should be inclined to agree in thinking that the defendants are liable to make good the loss arising from that breach of contract, on the principle of *Davis* v. *Garrett* (2), that the plaintiff could not qualify his wrong; or, as I should prefer to enunciate the same principle, that the condition relieving them from liability for a loss applies to a loss occurring whilst they are carrying out the contract, not to one incurred when acting in violation of it. *Lyon* v. *Mells* (3) seems to me to proceed upon the ground that the condition exempting the owners of the lighter from liability for any loss, unless such loss was occasioned by negligence in the master and crew of the vessel, could not be construed as exempting them from loss occasioned by their own default, and seems to me not applicable to such a case as the present. Such was the construction put on that decision by Coleridge and Erle, JJ., in *Chippendale* v. *Lancashire and Yorkshire Ry. Co.* (4), and, I think, by the Court of Exchequer in *McManus* v. *Lancashire and Yorkshire Ry. Co.* (5)

But in the present case I read the contract as being to keep

(1) 9 H. L. C. 556.
(2) 6 Bing. 716.
(3) 5 East, 428.
(4) 21 L. J. (Q.B.) 22.
(5) 2 H. & N. 702; 27 L. J. (Ex.) 201; 4 H. & N. 327; 28 L. J. (Ex.) 353.

safely, i.e. with reasonable and proper care in any way which to the defendants seemed best, and to deliver up the goods on the production of the ticket if brought at the proper office hours to the cloak-room. I do not think that depositing the luggage in the vestibule would have been any breach of contract, if the defendants had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place. They would, if these parcels were under the value of 5*l.*, be in my opinion liable, not because they placed them in the vestibule, but because they took no care of them when there. I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care, with, in effect, a proviso that, inasmuch as the remuneration is very small and the loss may be very great, the defendants shall not be responsible for loss if the goods exceed 5*l.* in value, unless the value is declared and paid for. So construed, the condition protects the defendants in the present case.

This question is of much less importance than the first, as the conditions can easily be altered if the intention of the defendants is not expressed on them, but it would equally decide this particular case.

In my opinion the judgment ought to be for the defendants, and, as Mellor, J., agrees with me, the judgment of the Court will be for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Masterman, Hughes, Masterman, & Rew.*
Solicitor for defendants: *R. Nelson.*

1876
July 4.

SWIRE AND ANOTHER *v.* REDMAN AND HOLT.

Two Joint Debtors, Right of, as against Creditor with Notice, to be treated as Principal and Surety.

5 Ch D 257

R. & H., being in partnership, were in the habit, through plaintiff's firm, of consigning goods to B. & S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which the plaintiffs accepted bills drawn by R. & H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, plaintiffs accepted fresh bills, which the defendants negotiated and handed the proceeds to plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. & H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock, &c., of the old firm. Plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and, they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiffs' advances, and they brought an action against R. & H. to recover the balance.

R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R. :—

Held, that R. & H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. & H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances.

Oakeley v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S.) 548) distinguished.

Semble, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him.

Oakford v. *European Shipping Co.* (1 H. & M. 182) accord.

CLAIM to recover the balance of advances made by the plaintiffs to the defendants, Redman & Holt (by means of the acceptance by the plaintiffs of drafts of the defendants), upon consignments of goods made by the defendants to China, the proceeds of the sale of which were to be forwarded to the plaintiffs.

The defendant Holt let judgment go by default.

The defendant Redman stated as a defence that the plaintiffs, on the dissolution of the partnership between Holt and Redman,

had accepted the liability of Holt instead of that of the two defendants.

At the trial before Bramwell, B., at the Easter sittings in London, at the close of the plaintiffs' case,

Benjamin, Q.C., opened facts which he said discharged Redman; but the learned judge ruled that if the facts opened were proved, they would amount to no defence, and directed a verdict and judgment for the plaintiffs for 5479*l.* 5*s.* 11*d.*, the balance proved to be due to the plaintiffs.

The facts, nature of defence, and course of trial are sufficiently stated in the judgment of the Court.

An order to shew cause why there should not be a new trial was obtained, on the ground of misdirection of the learned judge in holding that, assuming all the facts alleged by the defendant to be proved to the satisfaction of the jury, the plaintiffs were nevertheless entitled to a verdict.

June 29, 30. *Cohen, Q.C.*, and *G. Bruce*, shewed cause.

Benjamin, Q.C., and *A. Wills, Q.C.*, in support of the order.

In addition to the authorities noticed in the judgment, the following were cited for the plaintiffs: *Bailey* v. *Edwards* (1); *Davies* v. *Stainbank* (2); *Hollier* v. *Eyre* (3); *Newton* v. *Chorlton* (4); and Lindley on Partnership, vol. i., 3rd ed. p. 452.

Cur. adv. vult.

July 4. COCKBURN, C.J. I will proceed to read the judgment in this case prepared by my Brother Blackburn, in which I fully concur.

In this action, tried before Baron Bramwell, the defendant Holt made no defence; and the action was tried between the plaintiffs and Redman, who defended.

After the evidence for the plaintiffs had been completed, Mr. Benjamin stated the defendant Redman's case; but the learned judge ruled that, supposing that the facts opened should be proved, there was no case for the defendant to go to the jury; and he

(1) 4 B. & S. 761; 34 L. J. (Q.B.) 41.
(2) 6 De G. M. & G. 679.
(3) 9 Cl. & F. 1, 45.
(4) 2 Drew. 333, 338–339.

1876

SWIRE v. REDMAN.

directed a verdict for the amount claimed, which was 5479*l.* 5*s.* 11*d.*

The facts proved on the evidence for the plaintiffs, so far as it is necessary to state them, were that the defendants Redman & Holt had been in partnership as spinners and manufacturers at Haworth, and also as stuff merchants at Bradford. They were in the habit, through the plaintiffs' firm, of consigning goods to Messrs. Butterfield & Swire in China, for sale, the proceeds of which were to be remitted by Butterfield & Swire to the plaintiffs' firm in London. By an agreement in writing, dated the 29th of December, 1868, between the plaintiffs' firm and the defendants, these remittances were to be held specially to meet the liability the plaintiffs might have incurred by advances to the defendants effected by accepting their drafts, and any balance was to be paid to the defendants.

The mode in which the advances were made was, that the defendants drew on the plaintiffs drafts proportioned to the invoice value of the goods consigned. These drafts the plaintiffs accepted, and the defendants discounted their acceptances. When the acceptances became due, if the remittances did not put the plaintiffs in funds to meet the acceptances, the defendants were bound to pay the plaintiffs the deficiency.

There seems to have been no express agreement at any time as to what was to be done in case the goods were not sold before the maturity of the acceptances; but, in practice, the plaintiffs, in such cases, accepted a fresh draft, which the defendants negotiated, and thereby obtained funds which they handed to the plaintiffs, who were thereby enabled to take up the first acceptances, and so to let the defendants have the benefit of the advance for a further time, without being under cash advance.

There could be no doubt that this was so constantly done that Redman & Holt would have felt aggrieved if the plaintiffs had suddenly refused to prolong the advances in this way, and would have had a right in such case to say that the plaintiffs were treating them harshly. Whether the plaintiffs would by so doing have committed a breach of contract on which an action would have lain, is, to say the least, doubtful; and from the way in which the case was disposed of, without actually taking the opinion of the jury on any question, the defendant's counsel are probably

entitled to argue that any points left doubtful must be taken to have been found in the way most favourable to him.

The course described was pursued for five years, till, on the 31st of December, 1873, the partnership between Redman & Holt expired by efflux of time, and of this the plaintiffs were then informed. At this date there were goods to a large amount consigned to Butterfield & Swire, and in their hands unsold, on the security of which the plaintiffs had, by accepting the drafts of Redman & Holt, made advance to the extent of many thousand pounds, for which the plaintiffs were liable, though they had been kept out of cash advance.

Holt, who had always managed the foreign trade, continued to manage the outstanding affairs of the late firm. He procured the renewal of the advances on many of the goods in the manner already described, by procuring the plaintiffs to accept fresh drafts, which he negotiated, and thereby obtained the funds necessary to keep the plaintiffs out of cash advance. These fresh drafts were drawn in the name of "Redman & Holt in liquidation." This continued till the 16th of November, 1874, up to which date the plaintiffs had no notice or knowledge that Redman & Holt were not equally interested in winding up the affairs of the late firm, and realising the proceeds of their consignments. On that day Holt, by a letter of the 16th of November, 1874, informed the plaintiffs that it had been then finally arranged between him and Redman that he, Holt, should take over the whole of the stock of the old firm, and Holt suggested, for that reason, that future drafts should be signed in his own name, instead of that of Redman & Holt. This was acceded to, and several of the advances originally made to the old firm of Redman & Holt, on goods consigned by them, and then their property, though now Holt's property, were continued in the manner described, the drafts by the discount of which the plaintiffs were kept out of cash advance being drawn on the plaintiffs by Holt in his own name.

The date of the writ in this action was the 3rd of December, 1875. Before that time the goods originally consigned by Redman & Holt had been sold and the proceeds received by the plaintiffs. These proceeds were not sufficient to repay the advances made to

1876

SWIRE v. REDMAN.

Redman & Holt; the deficiency was the amount for which the verdict was taken.

Part of this deficiency, 2000*l.* and upwards, arose in respect of advances on which there had been renewals prior to the 16th of November, 1874, by means of drafts of Redman & Holt in liquidation, but in respect of which there had been no renewals after the day on which the plaintiffs were affected with notice that the defendants Redman and Holt had agreed that Holt should take the stock of the old firm, and consequently that as between themselves Holt should be bound primarily to discharge the liabilities on that property, including the advances which the plaintiffs had made on their security to Redman & Holt jointly.

The remainder of the claim, 3000*l.* and upwards, was in respect of advances on goods not sold on the 16th of November, 1874, and on which the advances had been continued, the plaintiffs being kept out of cash advance by means of acceptances of Holt's drafts, discounted in the manner described.

The question in the cause is, whether Redman is still liable for either of these sums.

It seems to us clear that the original advances were money lent to Redman & Holt for which they were debtors, and that the drawing of fresh drafts which were accepted, as described, was not in any way a satisfaction of that debt, but only machinery by which it was provided that the time for payment should be extended without the plaintiffs coming under any cash advance. Part of Baron Bramwell's ruling was that there was no evidence that there had been any taking by the plaintiffs of Holt's sole liability in accord and satisfaction of the liability of Redman & Holt. And this, when the rule was moved, was thought so clearly right that no rule was granted on that point.

But the effect of the transactions was to grant an extension of time. For during the interval between the taking up of one of the drafts and the maturing of the substituted draft by means of which it was taken up, the plaintiffs could not have sued. And one point made by Mr. Benjamin in his opening was that the effect of this giving of time, as he said, to Holt alone, was to discharge Redmond.

1876

SWIRE v. REDMAN.

So far as regards the 2000*l.* odd, as to which there had been no renewal after the 16th of November, 1874, this seems to us absolutely untenable. For we think it clear law that a creditor, who has two principal debtors, may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may by his suit against the one debtor bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by the bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor. The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all. And if no damage at all has been received there is no compensation due to any one. And this, we cannot but think, is consistent with sound sense and clear justice. And therefore, so long as the plaintiffs had no notice that the relation between Redman & Holt had been changed from that of joint principal debtors to something else, the plaintiffs might bind themselves to Holt in any way they pleased to give him time without thereby affecting in any way their remedy against Redman the co-debtor; and this we apprehend is clear, not merely in justice and sense, but on all decisions both at law and equity.

But where the two who become liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different. The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right. And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue

1876

SWIRE v. REDMAN.

in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety,—in the immense majority of cases not damaging him to the extent even of a shilling,—must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems, if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature. And as it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor: *Pooley* v. *Harradine* (1), *Greenough* v. *McClelland* (2), and *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* (3)

This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone, and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time.

The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before—to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent.

(1) 7 E. & B. 431; 26 L. J. (Q.B.) 156. 3 Jur. N.S. 488.

(2) 2 E. & E. 424; 30 L. J. (Q.B.) 15. 6 Jur. N.S. 772.

(3) Law Rep. 7 Ch. Ap. 142.

It was however argued, that however much this might be contrary to principle, it was established by the decision of the House of Lords in *Oakeley* v. *Pasheller*. (1)

We do not think that any such point either arose or was decided in that case.

The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in Lindley on Partnership, 3rd ed. p. 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor Sir Charles Oakeley was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house which was indebted to Sir Charles, and then, by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the Lords we think sufficiently appears from both reports, ill as they are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondents could not be liable for his default except in consequence of some arrangement by which they became his sureties.

In the very meagre report of the judgment of the Master of the Rolls in Bligh (2), he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir Charles, which Kynaston could not be without Sir Charles's assent, "and Sherard's estate surety only." And during the argument in the House of Lords Lord Lyndhurst points out the difficulty in converting a joint debtor into a surety without the creditor's assent. (3) He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice. (4) And, finally, in the

(1) 4 Cl. & F. 207; 10 Bli. (N. S.) 548.

(2) 10 Bli. (N.S.) at p. 578, n.

(3) 10 Bli. (N.S.) at p. 586; see also 4 Cl. & F. at p. 232.

(4) 10 Bli. (N.S.) at p. 587.

1876

SWIRE v. REDMAN.

judgment he says, "an arrangement was made between Sir Charles Oakeley and Kynaston." (1) This would have been quite irrelevant unless Kynaston had become a new debtor, and the other parties, by agreement with Sir Charles, sureties for him.

It is impossible to suppose that if Lord Lyndhurst had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (as appears from 10 Bligh (N.S.) at p. 586 (2)) there was no previous decision, he would have done it in so perfunctory a manner as he appears to have done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little.

It is, however, true that in *Wilson* v. *Lloyd* (3), Bacon, V.C., in citing *Oakeley* v. *Pasheller* (4) takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three.

No English case has actually decided this point if *Oakeley* v. *Pasheller* (4) does not. But there is an Irish case cited by Mr. Wills, which should be noticed. It is that of *Maingay* v. *Lewis*. (5) There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench, on demurrer, unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which Lawson, J., based his judgment, which turned the scale. After stating the point he says: "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies, of a creditor, by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law." (6) So far we quite agree with him. But he adds, "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of

(1) 10 Bli. (N.S.) at p. 589.
(2) See also 4 Cl. & F. at p. 232.
(3) Law Rep. 16 Eq. 60, 70.
(4) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.
(5) Ir. Rep. 3 C. L. 495; in error Ir. Rep. 5 C. L. 229.
(6) Ir. Rep. 5 C. L. at p. 231.

Lords in *Oakeley* v. *Pasheller*, (1) and that I ought to follow it implicitly." Had Mr. Justice Lawson thought, as we do, that the decision in *Oakeley* v. *Pasheller* (1) proceeded on the ground that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal.

We think, therefore, that the rule in this case should be discharged on this ground.

There is another point which it is not necessary for us to decide, but which it is as well to mention. Redman and Holt had, when in partnership, requested the plaintiffs to give time under the circstances and in the way which they did after the dissolution to Holt alone. And, if the plaintiffs were not under a legal obligation to do so, there was a strong moral claim on them so to do. It seems strange justice to relieve Redman, because the plaintiffs in dealing with Holt after the dissolution in winding up a partnership debt pursued the very course which Redman had sanctioned and requested, if he had not stipulated for it; and *Oakford* v. *European Shipping Co.* (2) seems an authority for saying it is not equity.

Our judgment will be in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Flux & Co.*

Solicitor for defendant: *Field, Roscoe & Co., for Taylor & Co., Bradford.*

(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548. (2) 1 H. & M. 1[illegible]2.

1876
May 23.

[IN THE COURT OF APPEAL.]

THE RIVER WEAR COMMISSIONERS *v.* ADAMSON AND OTHERS.

Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 74—*Non-liability of Owner of Vessel for Damage to a Pier, caused by the Vessel being driven against it by Stress of Weather without Default of any one.*

The defendants' ship was driven on shore by a storm in endeavouring to make the port of Sunderland. The crew were taken off with difficulty, and the ship, being a complete wreck, was afterwards driven by the winds and waves against the pier belonging to the harbour, and did damage to it, for which the commissioners brought an action under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), which enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith":—

Held, that the language of the section, though general, must be interpreted with reference to the well-known principle of the common law, that a person is not to be made liable for damage caused by his property, without any default of his, through what is generally termed the act of God; and that the defendants were therefore not answerable under the section.

Dennis v. Tovell (Law Rep. 8 Q. B. 10) overruled.

Affirmed by H. of L. 2 Aff. Cas. 743.

APPEAL from the decision of the Court of Queen's Bench, refusing a rule to enter a verdict for the defendants or a non-suit.

The declaration charged that the plaintiffs were possessed of a pier at the Sunderland docks, by virtue of their Acts of Parliament, and the defendants were the owners of the steamship *Natalian*; that damage was done by the steamship to the pier to an amount exceeding 50*l.*, whereby and by virtue of s. 74 of the Harbours, Docks, and Piers Act, 1847 (10 Vict. c. 27) (1), the defendants were answerable to the plaintiffs.

Plea, inter alia, not guilty.

(1) 10 Vict. c. 27, s. 74: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel

1876

WEAR COMMISSIONERS v. ADAMSON.

At the trial before Quain, J., at the Durham summer assizes, 1873, the following facts were undisputed. The defendants' ship *Natalian*, on the 17th of December, 1872, when on a voyage from the Thames to the Tyne, was necessarily compelled by stress of weather and the violence of a storm to endeavour to enter the Sunderland Docks, by an entrance from the sea, as the only possible means of saving either the ship or the lives of those on board.

When the *Natalian* was properly pointed for the entrance, and whilst still outside it, and in the open sea at the distance of about sixty yards from the breakwater (the nearest of the plaintiffs' works) she struck the shore, and the lives of all on board were put in great peril, owing to the violence of the storm. The crew and other persons on board were saved by the rocket apparatus. At the time of the rescue of the crew and their necessary quitting of the ship she still remained where she had struck, about a hundred yards from the plaintiffs' pier. When the ship struck and the crew left the tide was low; some hours afterwards, when the tide rose, the ship was driven by the storm against the pier, and beaten against it so as to cause part of the damage. The rest of the damage was caused in a similar way at several subsequent tides. The storm continued to rage during the whole of the time between the quitting of the ship by her crew and the doing of the damage. At no time after the quitting of the ship was it possible for the crew or any other persons to go on board the ship or in any way obtain control of her; and before the doing of the damage the ship had become a complete wreck.

A verdict was entered for the plaintiffs, the amount to be ascertained by an arbitrator (which has since been assessed at 2825*l.*), with leave to move to enter a nonsuit, or a verdict for the defendants.

The Court of Queen's Bench, in Michaelmas Term, 1873, refused a rule, on the authority of the case of *Dennis* v. *Tovell* (1), Blackburn, J., expressing a hope that the Court of Appeal might see their way to a contrary conclusion.

---

where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

(1) Law Rep. 8 Q. B. 10.

1876

WEAR COMMISSIONERS v. ADAMSON.

Gorst, Q.C. (with him *Greenhow*), for the defendants. This case is distinguishable from *Dennis* v. *Tovell.* (1) Here the ship was derelict with no one on board; there the crew were all on board. It is obvious that the section contemplates some one being on board, the second clause shews this, which makes the person in charge, if guilty of negligence, also liable for the damage. But, secondly, this Court is not bound by the decision in *Dennis* v. *Tovell.* (1) The proviso at the end of the section as to the non-liability of the owner when a pilot is compulsorily on board, shews that the section cannot be intended to be taken in the extreme generality of its language.

[MELLISH, L.J. Where a duty or liability is imposed by contract, the act of God is not excepted, unless expressly excepted: but where the duty or liability is imposed by common law, there is such an implied exception of the act of God. Is not that principle applicable to the construction of a statute as well as to the common law?]

The Court then called upon

Herschell, Q.C., and *Shield* (with them *C. Russell, Q.C.*), for the plaintiffs. The section is in the most general and absolute terms, and the Court will not imply any exception merely because putting a plain natural construction upon the terms used may, in certain circumstances, work what seems to the Court a hardship. But, after all, there is no great hardship: one of two innocent persons must suffer, and it may well be that the legislature thought the owner of the moveable thing, the ship, which does the mischief, and must have been brought to the spot by the agency of the owner, should suffer and pay for the damage, rather than the owners of the immoveable thing, the pier or harbour works. It is clear that it was intended to extend the liability of the shipowner beyond the common-law liability for negligence; the section would be nugatory if it meant no more than this; and the proviso as to the pilot shews this, for otherwise there would have been no necessity for the proviso.

JESSEL, M.R. No doubt there are difficulties attending any

(1) Law Rep. 8 Q. B. 10.

construction of the section, upon the construction of which we are called upon to decide. It is equally indubitable that a mere literal construction would, on a consideration of the nature and objects of the statute, lead one to the conclusion that in every case the owner of the vessel was to be liable for any damage done by his vessel to the harbour, dock, or pier. But the consequences to which such a construction would lead are so startling that I think we must consider that they could not have been in the contemplation of the legislature.

The first proposition is this: that if a vessel is driven by stress of weather, without the fault of any one, and is shipwrecked against the pier, the unfortunate owner of the vessel must not only lose his vessel by shipwreck, but have to pay for the damage done to the pier. It is something like the kind of hospitality which in the long past was shewn to vessels when they had the misfortune to be wrecked on this coast. That would be a very startling conclusion to arrive at; but the matter does not stop there; because, if the vessel were driven against the pier by the undertakers themselves, so that it was their wrongful act which caused the vessel to be driven against the pier, the damage would still be done by such vessel. So that a literal construction would lead to this result, that the person who did the act might make the person who was wholly innocent pay for the damage occasioned by such wrongful act. There are many other cases which might be put. One was put in argument, perhaps not so probable as the first, but perhaps not more improbable than the second: the vessel might be taken by the Queen's enemies, and before condemnation used either as a battering ram or otherwise against the pier, and then being re-captured, the unfortunate owner, in whom the title would re-vest, would be liable for damages done to the pier by the Queen's enemies. A great number of other cases equally startling might be put as the result of construing the section literally. If that construction leads to so absurd and revolting a conclusion, then, if it is capable of any other fair interpretation, I think it is the duty of a Court of construction so to read the section. In the first place, the enactment is to be limited. There is a proviso at the end of the section: "Pro-

1876

WEAR COMMISSIONERS v. ADAMSON.

vided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel when such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of." The reason, which appears tolerably obvious to my mind, for that proviso is this: the owner is compelled by law to put the vessel in charge of the pilot, and he ought not to be liable for the acts of the pilot when the State takes the charge of the vessel from him and puts it into the hands of somebody else; the pilot may be liable, but the pilot is only liable for negligence; so that if, in the case I put of storm or tempest, or if, as we lawyers call it, by the act of God, the vessel is driven against the pier when a pilot is on board, the loss in that case would fall on the pier owners. Therefore, there is one case in which, at any rate, the pier owners are to take the chance, which every owner of a pier must know must result from the action of the weather, of damage, in the same way as he might be damaged by a thunderstorm, or by any other accident independently of any vessel being concerned in doing the damage; it appears to me, therefore, judging from that proviso, that the legislature did not intend to make the owner of the vessel always liable where the matter happened from causes entirely beyond his control.

Therefore we are driven back on the familiar maxim of law, that where there is a duty imposed, or a liability incurred, as a general rule, there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies. Considering that that is the general rule of law, looking at the general object and purview of this Act of Parliament, and considering the exception I have mentioned, I think we may well come to the conclusion that the act of God and the Queen's enemies were not intended to be comprised within the first words of the section; and, consequently, in this case the defendants ought not to be held liable.

Therefore I think the decision of the Court below must be reversed.

KELLY, C.B. I entirely agree with Mr. Herschell in the argument he has urged, that we are not to disregard the express terms of an Act of Parliament merely because their literal construction does not provide against a possible case of inconvenience or even of injustice. But there are certain principles of law, which, though not expressed either in the common law, or in the judgments of judges, or in the language of Acts of Parliament, nevertheless must be held to qualify all that fall from judges in expounding the Common Law, and all that is to be found throughout the the statute book in the various Acts of Parliament. Among those principles and maxims is this: That no man can be made answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. And the justice of that maxim, and that it does apply to all cases, except where by express contract it is otherwise provided, is so clear, that I think that we ought to apply it to the present case; and, on the general language of this Act of Parliament, though at first sight it seems to provide that the owner of the vessel shall be liable whenever it comes in contact with the pier, yet that we must qualify that provision by introducing into it the maxim of the law, that no man is to be answerable for the consequences of the act of God. There is really something repugnant to common sense and to the first principles of justice to hold that any man shall be answerable for any injury done to a pier or any other property of any company, corporation, or individual, where by the force of the winds and waves, which no man can resist, and which in every sense of the word are to be deemed the agents of God, a vessel is driven against a pier, or any other objects of a similar nature. I think, therefore, on the ground that it is implied in the Act of Parliament that the exception of the act of God will protect the owner against the liability imposed by the literal terms of the enactment, we cannot hold the defendants liable here.

But I must say, upon a technical consideration of the language of the Act of Parliament, I go further, and I think that, reading the whole of it together, it contemplated the case of a vessel or float of timber, which was in charge of some person or persons.

1876

WEAR COMMISSIONERS v. ADAMSON.

The words are "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, piers, or the quays or works connected therewith." If it had stopped there, no doubt the provision would have been general, absolute, and imperative; but it does not stop; there is a comma in the Act of Parliament after the word "therewith," and the section proceeds, "and the master or person having the charge of such vessel or float,"—that is continuing the same sentence, and therefore seems to imply that the sentence refers to a vessel of which some master or some other person has the charge,—"and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall *also* be liable to make good the same, and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same." Then what is the meaning of the word "also?" There is to be superadded to the liability of the master or person by whose wilful act or negligence the mischief is occasioned the liability enacted by the statute. It appears to me that is a reasonable construction of the words of the statute itself, even apart from the implication to which the Master of the Rolls has alluded, and in whose observations I entirely concur, that as to anything resulting from the act of God the defendants cannot be held liable.

I would only observe, with regard to what has fallen from the Master of the Rolls, if it had been intended by the legislature that from whatever cause, whether through the wilful act or negligence of the master or other persons, the pier had been injured, nevertheless the owner should be liable, they would never have introduced into the same sentence the proviso that where there is a pilot on board whom the owner is bound to employ, who takes the management of the vessel out of his hands, then the owner shall be no longer liable. An observation may be made upon this question which fortifies the construction which I must say, speaking for myself, I put upon the section. Taking it altogether, though this section exonerates the owner, it does not exonerate the master

or any other person through whose wilful act or negligence the mischief is occasioned. It says the owner shall be liable where either the master or person in charge of the vessel by wilful act or by negligence occasions the mischief to the pier, or runs the vessel against the pier, save only in the case of the pilot; but it also goes on to provide,—and that is the principal object of that part of the section,—that in addition to the liability of the owner, which no doubt is specially enacted, the individual who is the wrong-doer and who occasions the mischief in question, whether the master or the person in charge, shall be likewise liable as well as the owner.

I think, therefore, that on all these grounds the defendants are not liable, and consequently the judgment of the Court below ought to be reversed.

MELLISH, L.J. I am of the same opinion. I think, looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law: because, if that is not the intention, it is not easy to see the object of the section at all. Looking at the pointed language in which negligence or wilful act is brought in, looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to shew clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it. But the question arises, because we may decide, on the language used, that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever, where the vessel physically damages the pier, &c., the owner is so liable? I am of opinion that the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier. It is quite consistent with our law that in certain cases a person may be made liable as insurer against the acts of all the men whom he may have under his control. And many examples of that may be put.

1876

WEAR COMMISSIONERS v. ADAMSON.

But although that is the case with regard to the act of man, the act of God is in view of the law opposed to that which may be said to be act of man, and the act of God does not impose any liability on anybody. Although, of course, the legislature are not bound by any such rule, and may make a person liable for what is the consequence of the act of God, if the legislature is so pleased; yet in construing the words of an Act of Parliament we are justified in assuming the legislature did not intend to go against the ordinary rules of law, unless the language they have used obliges the Court to come to the conclusion that they did so intend. Then the question is, looking to the whole of the section, did the legislature intend to make the owner of the ship liable only for the act of man or did they intend to make him liable for the act of God—in other words, where, without his own fault or the fault of anybody whatever, but through the violence of nature, the vessel has been driven against the pier? Looking at it so, without going through the words of the section again, it appears to me that I am bound to agree with the remarks which have been made by the Master of the Rolls and by the Lord Chief Baron; and that the section points to something that is done by the act of man, or to the act of the person in charge. It looks as though the legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable; but if it was the consequence of the negligence of somebody else that person is not discharged, and you may have your remedy over. Then they make one exception to that rule in the case of a pilot. They say if a pilot is in charge of the vessel, even although it may be by his act, the owner will not be liable. I do not think that it was intended by the legislature to put upon the shipowner the absolute liability occasioned by the ship being driven against the pier when she is really on the high seas, and thence being driven from outside the harbour by the violence of the winds and waves against the pier. Therefore I agree that the judgment should be reversed.

1876

WEAR COMMISSIONERS v. ADAMSON.

DENMAN, J. I am of the same opinion. No doubt, taking the words of s. 74, it is possible to hold that they impose an absolute liability to the dock-owner on the part of the owner of the vessel. The words are strong, intelligible, and grammatical. [The learned judge read the first part of the section.] But I am of opinion, taking the rest of the section, some qualification must be put on those words, not by introducing fresh words into the Act of Parliament, or supposing a clause to exist in it which does not exist, but by qualifying those words by the principle of law which is so well known, and which must be taken to override the language of an Act of Parliament. I apprehend that there is no principle of law better established than this, that in an Act of Parliament words are not to be construed to impose upon individuals a liability for an act or acts done, if those acts are not done by the individual, or not caused by his property or his servants, but are acts which are substantially caused by a superior power, such as the law calls the act of God. In this case there can be no doubt, from the facts, that the injury occasioned by the vessel was not the result of any neglect on the part of the owner, or on the part of any person having charge of the vessel, or, indeed, of any human being, but it was really the effect of the violence of the winds and waves overcoming all control on the part of the master or owner of the vessel, and forcing the vessel against the pier. Under those circumstances I apprehend, on the general principle that every statute is to be so construed as to leave untouched a principle of common law which applies to all similar cases, we are not bound to hold—and ought not to hold—that the damage was done by the vessel within the meaning of the Act of Parliament; but that, on the contrary, it was damage occasioned by the act of God, and therefore no action lies.

With regard to the other words of the section, I think a strong argument arises from the clause which contemplates the punishment of a person who has charge of the vessel. I do not myself, however, go so far as to think that there might not be a case where the owner of the vessel would be liable when no person was in charge. If there was a person appointed, although not on board, but who ought to have been controlling the vessel, and

1876

WEAR COMMISSIONERS v. ADAMSON.

through his negligence the accident is occasioned, I think the section would apply. Therefore I should put that qualification on the generality of the proposition that the damage must be the act of man. I think this section does not exclude the exception of the act of God, which, in my opinion, was the sole cause of the accident here; and so thinking, I hold the defendants are not responsible.

POLLOCK, B. I am of the same opinion, although the process of reasoning by which I have arrived at that conclusion is not the one which has been adopted by the other members of the Court. We are bound to put a reasonable construction on the section. To put a reasonable construction is not to put a construction which might produce the result that may appear to the Court reasonable, but it is to apply to the section that meaning which would seem to carry out the intention of the legislature as applied to the subject-matter with which they were dealing. I find in this Docks Act clauses providing for the cleaning of the dock, the protection of things in the dock, and all the necessary provisions with regard to vessels and timber-floats which may be placed in the dock, or which are going into the docks, or going out of the docks. Looking at it in this aspect, one of the things the section in question intends to provide is, that in the event of the structure of the dock being injured by vessels or floats of timber, the owners of the dock are not to be put to the proof of negligence, or to the proof of how the injury was occasioned.

I am not prepared to say that, if it was the case of damage done during the night to one of the dock gates by a float of timber, that it would be any answer to say it arose from some unforeseen cause or accident against which human providence would not provide. I do not know what would be meant in that case by the act of God. We know what is meant by the act of God in the case of lightning, &c. I do not know how it may be as to matter as to which the providence of mankind may or may not prevent a particular result. Therefore, if that were the case here, I should pause before I came to the conclusion at which the rest of the Court have arrived; but this is a case in which

1876

WEAR COMMISSIONERS v. ADAMSON.

the vessel was extraneous to the dock entirely; out on the high seas, she met with certain risks and injuries which compelled her crew to leave her, and she became derelict, and in that condition, being wholly extraneous of the dock, she is by force of the elements driven against it; that seems to me to be an event which the section did not intend to provide against, and there is nothing, looking to the subject-matter and the difficulty of providing against it, unjust or unreasonable in holding it not within the section. In all other respects I agree with what has been said by the rest of the Court, and I think the judgment ought to be reversed.

Judgment reversed and entered for the defendants.

Solicitor for plaintiffs: *J. W. Hakin, for Ralph Simey, Sunderland.*

Solicitors for defendants: *Johnson & Weatheralls, for E. H. Haswell, Sunderland.*

1876
May 3.

THE QUEEN ON THE PROSECUTION OF THE ST. ALBAN'S RURAL SANITARY AUTHORITY, APPELLANTS; *v.* THE BARNET RURAL SANITARY AUTHORITY, RESPONDENTS.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55) *ss.* 48, 269—*Fourteen Days after "Cause of Appeal"—Time running from Decision, and not from Service of Order.*

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48, a court of summary jurisdiction may, under certain circumstances, order the local authority to cleanse offensive ditches and execute permanent or structural works. By s. 269, "Where any person deems himself aggrieved by any rate made under the provisions of the Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, he may appeal, subject to the conditions following: 1. The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made. 2. The appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal.

An order was made on the appellants under s. 48, on the 6th of September, and served on them on the 24th. The appellants, on the 2nd of October, served on the respondents notice of appeal to the sessions:—

Held, that the time for notice of appeal ran from the date of the decision, and not from the service of the order of justices; and, consequently, that the notice was too late.

UPON appeal to the Hertfordshire quarter sessions against an order of justices, dated the 6th of September, 1875, upon the St. Alban's rural sanitary authority, to cleanse a watercourse and ditch and to execute certain structural works within their district, the order was quashed, subject to the opinion of the Court on the following case.

The Barnet rural sanitary authority, whose district adjoins that of the St. Alban's rural sanitary authority, made a complaint before two justices of the foul condition of a watercourse or open ditch lying near to or forming the boundary of the two districts, caused by the flow of sewage from certain houses in the district of the St. Alban's rural sanitary authority. On the 6th of September, 1875, two justices made an order as a Court of summary jurisdiction under the Public Health Act, 1875 (38 & 39 Vict. c. 55), on the St. Alban's rural sanitary authority to cleanse the water-

course or open ditch and to do such permanent structural work as should be necessary to prevent the said water-course or open ditch from again becoming foul and offensive. This order was served on the St. Alban's rural sanitary authority on the 24th of September. Against this order the St. Alban's rural sanitary authority appealed to the Michaelmas quarter sessions, and on the 2nd of October served notice of appeal on the Barnet rural sanitary authority.

It was contended, on the hearing, by the respondents, that the notice served on them was invalid, not being given within fourteen days after the cause of appeal had arisen, which, it was contended, was the decision of the court of summary jurisdiction, from which the appeal was made under 38 & 39 Vict. c. 55; but (no evidence being offered on the part of the respondents) the sessions quashed the order, considering that the cause of appeal dated from the service of the order, and not from the decision of the court.

The question for the opinion of the Court is, whether the notice was valid, being served more than fourteen days after the decision of the court of summary jurisdiction from which the appeal was made, but within fourteen days after the service of the order of such court.

W. A. Clark (*Croome* with him) for the appellants. The notice of appeal was not too late, for the "cause of appeal" mentioned in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269, subs. 2 (1),

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48, a court of summary jurisdiction may, under certain circumstances, order the local authority to cleanse offensive ditches and execute such permanent or other structural works as may appear to the Court to be necessary. By s. 269, "where any person deems himself aggrieved by any rate made under the provisions of the Act, or by any order, conviction, judgment, or determination of, or by any matter or thing done by any court of summary jurisdiction, such person may appeal therefrom, subject to the conditions and regulations following—(1.) The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate, or the decision of the court from which the appeal is made; (2.) The appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party, and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal, and of the ground thereof.

1876

THE QUEEN v. BARNET SANITARY AUTHORITY.

begins only upon the service of the order, and not when it is first made. There can be no distinction between the description "cause of complaint," and the present words "cause of appeal," and there is abundant authority to shew that where the appeal is given so many days from the "cause of complaint," the time is to be computed from the last act done by the justices, as the execution of a warrant of distress, and not the mere signing of it: *Reg.* v. *Justices of Devon* (1); *Reg.* v. *Justices of Salop* (2); *Reg.* v. *Justices of Lancashire.* (3) In *Reg.* v. *Middleton* (4), it was held that the fourteen days for giving notice of appeal against an assessment under the Nuisances Removal Act, 1855, ran from the service of the notice of assessment, and not from the time when the amount was fixed by the local authority.

[BLACKBURN, J. In that case it might very well be said that a man could not appeal against a rate until he had been informed of it.]

It is true that in *Ex parte Johnson* (5), it was held, following *Reg.* v. *Darbyshire* (6), that under 7 & 8 Vict. c. 101, s. 4, which requires notice of appeal by the putative father against an adjudication in bastardy to be given within twenty-four hours after the adjudication and making of the order, the time runs from the verbal adjudication at the petty sessions, and not from the time the formal order is drawn up and signed by the justices. But there the words were "after the making of the order."

W. H. Michael, for the respondents. There is no express authority upon the construction of the words "cause of appeal," but there can be no doubt that the cause of appeal is the order of the justices. This being so, the time for appeal runs from the making of the order, not from the time when it is served. The only cases where a different rule has been adopted have been when the order has been for payment of money.

[BLACKBURN, J. Where anything like a rate or assessment is made behind the back of the person affected by it, one can understand the distinction.]

(1) 1 M. & S. 411.
(2) 2 B. & Ad. 145.
(3) 8 B. & C. 593.
(4) 1 E. & E. 98; 28 L. J. (M.C.) 41.
(5) 3 B. & S. 947; 32 L. J. (M.C.) 193.
(6) 7 Q. B. 193; 14 L. J. (M.C.) 84.

Here the order is made in the presence of the person affected by it.

BLACKBURN, J. I do not think we need trouble the counsel for the respondents any further, for the point seems clear.

Sect. 269 of the Act states three subjects of appeal, first, a rate, which may very well be made behind the back of the person rated, and therefore the appeal is so many days after demand of the rate. Secondly, there is an appeal from any order, conviction, or determination of any Court of summary procedure. Where the appeal is against a rate, the "cause of appeal" would primâ facie be upon notice of the rate, but where the appeal is from any order or conviction, one would certainly, primâ facie, say that as soon as the order is made the party has a right to appeal, and is not bound to wait until the order is served. Then what are the express provisions as to time of appeal? By s. 268, any person aggrieved by the decision of a local authority may appeal to the Local Government Board "within twenty-one days after notice of such decision." This clearly means after notice that such a decision has been pronounced. Then s. 269 says, that if any person deems himself aggrieved by any rate under the Act, or by any order, conviction, judgment, &c., he may appeal; and by subs. 1 the appeal shall be made to the next court of quarter sessions for the county, &c., in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made. And by subs. 2, the appellant shall, within fourteen days after the cause of appeal has arisen, give notice of his intention to appeal. The draftsman does not say "within fourteen days from the decision of the court," but, from reasons of style, or some other reason, chooses to use the words "cause of appeal," but these words must mean the same as the words in the previous subsection, "demand of the rate or decision of the court:" so that the time which is given is fourteen days from the date when the decision is made, in which case the decided cases shew the time for appealing is the time at which the decision is given, and not the time when the order is served. The case of *Reg.* v. *Justices of Lancashire* (1)

(1) 8 B. & C. 593.

1876

THE QUEEN v. BARNET SANITARY AUTHORITY.

cited on the part of the appellants was a case where the matter complained of was an order for the performance of statute duty, and was something in the nature of a rate, and it was held that the matter of complaint arose from the time when the order was served and the appellant had notice that he was charged; and the decision was clearly right, for the order was in his absence, and was not complete till it was served. But upon appeal from an order or a conviction under this Act, the time clearly runs from the time when the decision is pronounced, and not when it is drawn up and served.

MELLOR, J. I am of the same opinion. The Act, by s. 48, enables justices to summon the local authority to appear and shew cause why an order should not be made upon them for cleansing ditches, or executing structural works, as may appear to be necessary. It has been argued that the present case is like that of *Reg.* v. *Justices of Lancashire* (1), but I think it is not. Here the local authority had, under the Act, an opportunity to shew cause, and unless they chose not to appear, the order could not have been made in their absence. When does the time for appealing begin? Obviously from the decision of the court. By s. 269, subs. 1, the appeal is to be made to the quarter sessions holden not less than twenty-one days after the decision of the court. Now, does the change of expression in the next subsection, using the words "cause of appeal," instead of the words "decision of the court," make any difference? I think not. The cause of appeal begins from the time the order is pronounced. The order is not required to be in writing, it may be a verbal and informal decision, and the party convicted either does know or ought to know the grounds on which the justices have proceeded. I cannot see any difference between the meaning of the words "cause of appeal" and "decision of the court."

Order of quarter sessions quashed.

Solicitor for appellants: *E. W. Beal.*
Solicitor for respondents: *Harris.*

(1) 8 B. & C. 593.

[IN THE EXCHEQUER CHAMBER.]

1875
Jan. 19.
1876
Feb. 26.

EDWARDS *v.* THE ABERAYRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

Mutual Insurance Society, Construction of Rules of—Clauses of Arbitration and against bringing Action—Form of Policy—30 & 31 Vict. c. 23, s. 7—Specification of particular Risk or Adventure.

4 Asp. Ca. 681

The defendants were a limited company for the mutual insurance of ships belonging to members. By the articles of association: 4. No person shall become a member until he shall have signed the articles. 28. The business of the company shall be managed by directors. 39. The directors shall have full power to determine all disputes arising between the society and members concerning insurances or claims upon the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members; and no member shall be allowed to bring any action or suit against the society for any claim upon the society, except as is provided by these presents; and the directors may, if they think fit, cause any of such claims, and the amount to be paid to any member, to be referred to the decision of an average adjuster, and his decision shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom. 40. Two directors specially authorized and the chairman shall alone have power to sign and execute all policies approved by a board of directors. 63. If any member sell any vessel insured by the society, the purchaser of such vessel, if not a member, shall have no claim upon the society; and if a member, he shall have no claim until the vessel be entered in his name on the books of the society. 83. In all cases of any vessel insured by the society being lost or damaged, the owner, master, or mate or crew, shall, as soon as possible, give notice to the secretary of the society, who shall summon the board; and the directors shall proceed to examine the owner, master, and mate, and such of the crew as they may think necessary, as to the cause of the loss or damage, and shall make such decision as in their judgment the case may require. 84. If any member is dissatisfied with the decision of the directors as to the settlement of any loss or damage sustained by him, and such member shall procure ten members, not being directors, to join in a requisition to the directors to reconsider their decision, a board of not less than ten directors shall reconsider such decision.

In December, 1868, the plaintiff became equitable mortgagee of the ship *H.*, D. being registered owner. In January, 1869, D. insured the vessel with the defendants, directing the policy to be made out in plaintiff's name; this was not done, but the policy was forwarded by the defendants to the plaintiff. The policy was headed with the name of the defendants' society, and after giving details as to the rates of insurance, &c., and referring to one of the rules or articles, at the bottom was: "March, 1869. This is to certify that Mr. D., as ship's husband for the *H.*, whereof is master at present time D., has this day paid 17*l.* 10*s.* for the insurance of 52 shares on the said vessel. Value of ship as per rule for this class, 7*l.* 10*s.* per ton, 1215*l.*" The policy was duly signed by the

1875–6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

chairman and two directors. In January, 1870, the ship being on a voyage, the plaintiff applied in his own name for a renewal of the policy, and paid the premium, and a policy was forwarded to the plaintiff by the defendants, which was precisely like the former, except that the plaintiff's name was inserted as the ship's husband. No copy of the rules was ever given to the plaintiff, and he had no knowledge of the provisions until after the loss of the vessel. In March, 1870, a call was made on the plaintiff in respect of the *H.* for the losses of the society for the year 1869, and plaintiff paid it. Another call was made and paid in October 1870. In May, 1870, the *H.* was registered in plaintiff's name, but no notice was given of this to the defendants. In November, 1870, the *H.* was wrecked and became a total loss. The plaintiff sent in his claim, and on the 6th of January, 1871, D., who was master at the time of the loss, attended a meeting of the directors at their requisition, and they, having heard his account of the wreck, resolved that it was not found that the *H.* was lost by perils of the sea, and that the owners had no claim upon the society. No notice of this meeting or of the resolution was given to the plaintiff. On the 6th of April, 1871, a notice signed by ten members, but not signed by the plaintiff or D., was sent to defendants' office, and at the next quarterly meeting of the directors, no notice to attend having been given to plaintiff or D., the directors, without further inquiry, confirmed the former resolution. In an action brought by the plaintiff against the defendants to recover the amount of his insurance, in addition to the above facts, it was admitted by the defendants that the *H.* was a total loss by perils of the seas; the Court having power to draw inferences of fact:—

Held, in the Court of Queen's Bench (by Blackburn, Mellor, and Lush, JJ.), 1st. That the policy sufficiently specified the particular risk or adventure within the meaning of 30 & 31 Vict. c. 23, s. 7. 2nd. That defendants were precluded from saying the plaintiff, who was the owner of the ship, was not a member of the society, after having accepted an insurance and taken premiums and other payments from him. 3rd. That the fact that the plaintiff turned his equitable interest into a legal interest after the policy was renewed by him did not bring the case within art. 63. But 4th. That defendants were entitled to judgment: for that the contract was contained in the policy and any of the articles applicable; and that article 39, which regulated the manner of the payment under the policy, did not exclude the jurisdiction of the courts of law, but made it a condition precedent to bringing an action that the loss of the particular member should have been first decided upon by the directors, subject to the appeal given by article 84.

The Exchequer Chamber reversed the judgment of the Queen's Bench.

By Amphlett, B., on the ground, that, if the investigation by the directors had been properly conducted the action could not have been maintained; but that the conduct of the directors, by adjudicating against the plaintiff's claim without hearing him, or giving him an opportunity of being heard, was not binding on the plaintiff; and that, under the circumstances, the defendants could not take advantage of the wrong done by their agents by setting up as a defence that the determination of the directors in favour of the plaintiff was a condition precedent to bringing the action, and that an actual loss being admitted, the plaintiff was entitled to recover the amount.

By Kelly, C.B., and Brett, J., on the ground that such of the articles as were

applicable must be read with the policy, and that articles 39, 83, and 84 were intended to prevent the insured from maintaining any action or suit at all in the ordinary courts in respect of any dispute arising on the policy; and that, therefore, the articles were invalid, and did not prevent the plaintiff from maintaining the action.

Archibald, J., and Pollock, B., were of opinion that the judgment ought to be affirmed, on the ground taken by the Queen's Bench.

Held, also, by Archibald, J., and Pollock, B., and *semble*, by Kelly, C.B., and Brett, J., that the policy was valid within 30 & 31 Vict. c. 23, s. 7.

CASE stated in an action brought to recover the sum of 1000*l.* in respect of a total loss of a vessel called the *Hermione*, alleged to have been insured by the defendants to that amount.

1. The plaintiff is a farmer residing in Cardiganshire, and the defendants are a mutual insurance society, incorporated under the Joint Stock Acts, 1862 and 1867, and established at Aberayron in that county.

The memorandum of association stated (paragraph 3) that the objects for which the company is established are the mutual insurance of ships belonging to the members of the company, and the doing of all such other things as are incidental or conducive to the attainment of the above objects.

The articles of association contained, amongst others, the following clauses:—

3. *Definition of Members.*—Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

4. *New Members of the Society to be approved of by the Directors, and to execute Deed.*—That no person, except the persons who have signed the copy of these articles kept for that purpose at the office of the company, previously to the complete registration of the society, shall become a member of the society, until his admittance shall have been consented to by a board of directors, and he shall have signed the copy of these articles kept for that purpose at the office.

28. *Powers of Directors.*—The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting. . . .

39. *Directors to have Power to contract and settle Disputes between the Society and Members.*—That the directors shall have full power to enter into and execute, and also to modify, alter, or release any contract or agreement respecting any matter in which the society may be interested; and to adjust, settle, and decide all claims and demands upon the society by the members thereof; or to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurances or claims upon, or liabilities by or to the society, and concerning the laws, rules, regulations, and bye-

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

laws of the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof; and no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society or the members thereof, for any claims or demands upon, or in respect of the society or the members thereof, except as is provided by these presents; but no director, who shall be interested in the particular matter which shall be referred to the directors, further or otherwise than a general member of the society, or whose claims upon the society shall be submitted to the decision of the directors, shall be allowed to vote or interfere in such matter or claim; and in case any question shall arise as to any director being allowed to vote in such matter or claim, such question shall be finally decided by the directors present at any board, exclusive of the director whose vote shall be questioned; and the directors may, if they shall think fit, cause any of such claims and demands, and the amount to be paid to any member of the society, to be submitted and referred to the decision of any person practising as an average adjuster of marine assurances, who shall be attended by, and have the same powers of calling for, and enforcing the attendance of, claimants and other evidence, as the directors would; and the directors, or any person on behalf of the society, and the claimant, or any person on his behalf, shall be at liberty to attend and produce any evidence before such average adjuster; and in every such case the decision or award of such average adjuster shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom.

40. *Chairman and two Directors to execute and sign Policies, Agreements, Cheques, &c., for the Society.*—That two of the directors, authorized by resolution of a board of directors in writing in that behalf, together with the chairman for the time being, shall exclusively have power to sign and execute all policies of assurance approved of by a board of directors, and to sign, draw, indorse, and accept all agreements, bills of exchange, and promissory notes, and all cheques and orders for the payment of money, all which policies, &c., but no others, shall be binding on the society. . . .

53. *Insurances to be approved of and accepted by the Directors.*—That no ship or vessel, or share of a ship or vessel, of any member, shall be considered to be insured by the society, until the insurance thereof shall have been accepted and approved of by the directors, and the acceptance thereof and the terms of the insurance entered in a book, to be kept for that purpose, by the directors, or in a policy of insurance, to be duly executed on the part of the society.

61. *Insurance to extend to Partial Loss or Damage.*—That the insurance of the society shall not only extend to total loss, but also to partial loss or damage, but no claim shall be made upon the society in respect of any loss or damage whatsoever, unless such loss or damage shall amount, upon A 1 British-built ships, to four pounds per cent. upon the whole or total value thereof; upon A 1 Red British-built, and A 1 colonial-built vessels, of six years and upwards to 5*l.* 6*s.* 8*d.*; upon British A 1 Black, and A 1 four years colonial-built ships, to 7½ per cent.; and A 1 Black colonial to 9*l.* per cent. upon the whole or total value thereof.

63. *On Sale of Vessels insured.*—That if any member of the society shall sell any vessel, or shares of any vessel insured by the society, his claims upon the society, and liability to contribute to the losses or damages of other members of

the society in respect of such vessel or shares, shall cease as soon as the possession of such vessel or shares shall be delivered to the purchaser thereof, or the sale shall be otherwise completed, and notice in writing of the sale shall have been given by the member so selling to the secretary, but not before; and the purchaser of such vessel or shares, if not a member of the society, shall have no claim upon the society in respect thereof: and if the purchaser be a member of the society, such member shall have no claim upon the society in respect thereof, until he shall have entered such vessel or shares in his own name in the books of the society, and in all respects have conformed to the laws, rules, and regulations of the society, in respect of such vessel or shares.

74. *Vessels to have Ship's Husbands.*—That every vessel insured in the society shall have an agent or ship's husband, whose name and address shall be delivered by the owner or owners thereof to the secretary, and be entered by him in the books of the society; and every such agent or ship's husband shall have full power to transact and settle all matters of business with the society relating to such vessel, and to pay, and receive, and give discharges for all moneys which shall be payable from, or receivable by, the owner or owners of such vessel to or from the society; and to whom all notices and demands affecting the owner or owners of such vessel may be delivered, and when delivered, shall be binding on such owner or owners.

83. *Notice to be given of Damage or Loss of Vessels insured.*—That in all cases of any vessel or share thereof insured by the society being lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, by being run down, or otherwise injured by any other vessel, the owner, master, or mate, or some of the crew, shall, as soon as circumstances will permit, give notice thereof to the secretary of the society, who shall thereupon, by letter to the several directors, summon a board of directors on the first convenient day, not exceeding seven days from the receipt of such notice; and the directors shall proceed to examine the owner, master, and mate, and such of the crew as they shall think necessary, as to the cause of such loss or damage, and shall make such further inquiries, and take such measures, and make such decision and regulations thereon, as in their judgment the case shall require; and the owner or master of any vessel so lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, shall not commence any repairs, except such as shall be deemed necessary for the immediate safety of such vessel; or settle or compromise any claims or disputes, or prosecute or defend any action or suit in relation thereto, without the previous consent of the directors.

84. *For obtaining reconsideration of Claims by the Directors.*—That if any member of the society shall be dissatisfied with the decision of the directors, as to the settlement of any loss or damage sustained by such member, or as to any claim or other matter settled, adjusted, or decided by the directors, and such member so dissatisfied shall procure ten other members of the society, not being directors, to join with him in a written requisition to the directors to reconsider and revise their decision, the directors shall thereupon call a board of directors, of not less than ten, and reconsider and revise such decision; and in case such member shall be dissatisfied with the further decision of such board of directors, such member so dissatisfied, together with twenty other members of the society, may, by writing under their hands, require the secretary to summon a special

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

general meeting of the society, to be held at any time not exceeding fourteen days from the receipt of such writing by the secretary, and such special general meeting shall have full power to confirm or vary the decision of the directors, and whatever shall be decided by the special general meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision.

2. In the month of December, 1868, the plaintiff's brother-in-law, D. Davies, was about to purchase the vessel *Hermione*, and the plaintiff agreed to make him advances to enable him to purchase and repair the vessel. The terms of the agreement dated the 22nd of December, 1868, were that the plaintiff agrees to lend to D. Davies sufficient money to purchase the *Hermione*, and also to advance a sufficient sum of money towards reclassing and repairing the vessel at the port of Cardiff, or to stand as surety for the same; that D. Davies could sell 32-64th shares of the *Hermione* in small shares as she was with the former owner before the end of December, 1869, and to pay back to the plaintiff the money of the whole ship with 5 per cent. interest. The agreement then stipulated that after payment of ship's expenses the profits were to be applied towards the repayment of the repairs, and that the policy of insurance was to be the property of the plaintiff. The agreement then further stated that on or before the end of December, 1869, all the purchase-money, interest, and all the repairs, and every other debt due to the plaintiff were to be paid and settled, or the shares of D. Davies, whatever they may be, in the vessel were to be the property of the plaintiff from that time, and D. Davies promised to transfer his shares of the vessel at the Custom House over to the plaintiff, and to forfeit all claims and all profits from the 31st of December, 1869.

3. The vessel was insured for the first time with the defendants' society in January, 1869. (1) The insurance was effected by D. Davies, who gave directions to the defendants' secretary that the policy should be made out in the plaintiff's name, and should be handed to him. Davies did not inform the defendants of the arrangement made, as mentioned in paragraph 2, with the plaintiff. The document was afterwards forwarded by post by the defendants to the plaintiff; it was in the usual form of policy issued by the defendants to their members. The material parts were:—

(1) The date, however, in the policy was March, 1869.

"Aberayron Mutual Ship Insurance Society, Limited. Registered pursuant to the Act 25th & 26th Vict. c. 89.

"Insurances effected on all ships classed on Lloyd's Register Book of Shipping at the following rates, set off opposite the respective classes, viz.:—[Then followed the rates.]

"No claim for damage sustained by ships insured in this society will avail unless the same will amount to the undermentioned percentage upon their whole value, viz.:—[Then followed the percentages, which are those given in Article 61.]

"New ships insured shall, in case of damage thereto, be allowed the full cost of the repairs to the hull and materials for the period of twelve months from the date of the commencement of the first voyage; but all or any ships or vessels suffering damage or destruction whilst discharging or loading cargo or ballast upon or from an open beach, strand, or roadstead, shall suffer a deduction of 10*l.* per cent. from the sum which would be payable in respect of the insurance thereof in such cases. Vide Article 70.

"That no vessel insured in this society shall sail from the United Kingdom on the following voyages, after the periods limited thereto respectively, viz.:—[Then follow the details.]

"In the event of any vessel insured by this society being in, or sailing from, any port in the West India Islands, the Bay of Honduras, or any part in the Gulf of Mexico, or the Spanish Main, between the first day of August and the first day of January, shall suffer a deduction of ten pounds per cent. in case of loss or average; and insurances on all vessels sailing to and from the Azores between the first day of November and the fifteenth day of March shall suffer a deduction of fifteen pounds per cent. in case of loss or average.

"That every insurance effected shall be valid and binding from twelve o'clock of the noon on that day on which the insurance shall be effected until twelve o'clock of the noon of the first day of January then next following.

"No. 1. Offices, Quay Parade, Aberayron, March, 1869.

"This is to certify that Mr. Daniel Davis, as ship's husband for the *Hermione*, 162 tons, A 1, Red, whereof is master at the present time Daniel Davies, has this day paid 17*l.* 10*s.* for the insurance of fifty-two shares, 1000*l.*, on the said vessel.

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

"Value of whole ship as per rule for this class, 7*l.* 10*s.* per ton, 1215*l.*"

The policy was signed by the chairman and two other directors, the secretary and treasurer.

4. In January, 1870, the vessel was on a foreign voyage under the command of Daniel Davies, and the plaintiff, in his absence, applied for a renewal of the insurance with the defendants. The premium of 17*l.* 10*s.* was paid by the plaintiff, and in March, 1870, the defendants forwarded by post to the plaintiff a document similar to the one set out in paragraph 3, but dated the 24th of February, 1870, and it certified that Evan Edwards (the plaintiff), as ship's husband of the *Hermione*, had paid 17*l.* 10*s.* for the insurance of that vessel.

5. No copy of the rules or articles of the association was furnished to the plaintiff, and it is to be taken for the purposes of this case that he had not read and did not know of the provisions contained in them until after the loss of the vessel.

6. In March, 1870, an application was made to the plaintiff for 17*l.* 10*s.*, being the contribution to the losses of the year 1869, payable in respect of the *Hermione*. This amount was paid by the plaintiff on the 31st of March, 1870, and a receipt for that sum was given to him (made out as received from him as ship's husband of the *Hermione*) by the treasurer of the defendants' society.

7. In October, 1870, a further call of 17*l.* 10*s.* was made on the plaintiff for the losses of the year 1870, and he paid the amount and obtained a similar receipt for the same.

8. On the 14th of May, 1870, D. Davies, by bill of sale, which was soon afterwards registered, transferred the *Hermione* to the plaintiff; no notice of this transfer was given to the defendants.

9. In June, 1870, D. Davies made a claim on the society for the amount of the loss of an anchor and chain of the *Hermione*. The claim was for 200*l.*, and was resisted by the society on the ground that the loss was one which should be contributed for in general average, and that the ship's proportion was only 7*l.* A copy of the rules was then furnished to D. Davies by the defendants' secretary, and the sum of 7*l.* was ultimately received by the plaintiff in payment of the claim.

10. The *Hermione* was wrecked and became a total loss off Pernambuco in November, 1870.

11. On the 2nd of December, 1870, the plaintiff sent in to the defendants a claim for the amount of the insurance of the *Hermione*, viz. 1000*l.*; and soon after D. Davies was requested to attend a meeting of the board of directors on the 6th of January, 1871; he attended accordingly, and was questioned as to the circumstances of the loss of the vessel. The directors expressed to Davies their opinion that his account of the wreck was not satisfactory, and that the loss was not shewn to have been caused by perils of the seas. When he had withdrawn from the room they came to the resolution "that the owners of the *Hermione* had no claim upon the society."

12. The plaintiff had no notice of the meeting, and neither Davies nor the plaintiff had notice of this resolution, or was required to attend the directors on any subsequent occasion.

13. On the 6th of April, 1871, a notice signed by ten members, but not signed by the plaintiff or Davies, was sent to the defendants' office. This notice was submitted to the next quarterly meeting of the directors; no notice to attend was given either to the plaintiff or Davies, and the directors, in their absence, and without further inquiry, came to the same resolution as before, "that the owners of the *Hermione* had no claim on the society."

14. The defendants now admit the total loss of the vessel by perils of the seas; but contend that they are not liable in this action on several grounds, amongst others, upon the ground that the document upon which the plaintiff brings this action does not specify the risk, and is therefore void as a policy of insurance, under 30 & 31 Vict. c. 23, ss. 7, 9. (1)

(1) 30 & 31 Vict. c. 23, s. 7: "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act, 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

Sect. 9: "No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped; and it shall not be lawful for the said commissioners or any officer of Inland Revenue to stamp any policy at any time after it is

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

15. They also contend that the rules and articles of association are to be treated as incorporated with the policy, and that under the rules the plaintiff is not a member of the defendants' society, and is not entitled to recover in respect of any loss.

There was no evidence to shew that persons insuring with the society were always required to sign the articles of association, and neither Davies nor the plaintiff had been requested to do so, either before or after the registration of the society.

16. The defendants also contend that the resolutions come to by the directors are a decision upon the plaintiff's claim, and that not having been appealed from in the manner pointed out by rule 84, the decision has become final and binding.

18. It is agreed that the Court shall have power to draw all such inferences of fact as should have been drawn by a jury.

19. It is agreed that the Court shall have power to make all such amendments as may be made under the Common Law Procedure Acts, and to amend the particulars if the Court shall think fit, so as to enable the plaintiff to recover all or any of the money paid by him to the defendants.

The question is whether or not the plaintiff has any cause of action against the defendants.

Q. B.

1875. Jan. 19. *Kenelm Digby,* for the plaintiff.

B. T. Williams, for the defendants.

The questions raised in the Court of Queen's Bench, and the arguments, sufficiently appear from the judgment of the Court.

In addition to the cases referred to in the judgments of the Court of Queen's Bench and the Exchequer Chamber, the following were cited: *Thompson* v. *Charnock* (1), *Braunstein* v. *Accidental Death Insurance Co.* (2)

---

signed or underwritten by any person, on any pretence whatever, except in the two cases following: 1st. Any policy of mutual insurance having a stamp or stamps impressed thereon, may, if required, be stamped with an additional stamp or stamps, provided that at the time such additional stamp or stamps shall be required the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant. 2nd. Any policy made abroad and chargeable with duty by virtue of 28 & 29 Vict. c. 96, s. 15, may be stamped within the time specified in that Act."

(1) 8 T. R. 139.

(2) 1 B. & S. 782; 31 L. J. (Q.B.) 17.

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Blackburn, J.

BLACKBURN, J. I am of opinion that upon the main point our judgment should be for the defendants, and that a nonsuit should be entered.

Four points have been discussed. The first is that the policy does not specify the risk or adventure, as required by the provisions of 30 & 31 Vict. c. 23, ss. 7 and 9, and is therefore void. The policy on its face clearly expresses that it is a marine insurance, and that the insurance shall be valid from 12 o'clock on the noon of that day in which the insurance shall be effected until 12 o'clock of the noon of the 1st day of January then next following. It is a time policy, and though the perils insured against are not stated with particularity, it does specify the risk or adventure.

The second point is that the plaintiff is not a member of the defendants' society, and cannot recover. In support of this contention articles 3 and 4 are relied upon. The defendants' society is a Mutual Insurance Society, and is formed into a limited company for that purpose, and the policy given to the plaintiff refers to the articles of association, which are incorporated as part of the contract of insurance. By article 3 every person shall be deemed to have agreed to become a member who insures any ship or share in a ship, and by article 4 no person shall become a member of the company until his admittance shall have been consented to by the directors, and he shall have signed a copy of the articles. Now it appears that the plaintiff had an equitable interest in the *Hermione*—he was the equitable owner of the ship, but his name did not appear on the ship's register as the legal owner. Davies, acting as ship's husband, first insured the *Hermione* for 1000*l.* with the defendants. The defendants accepted the insurance and received the premium; one or two years went by, during which the defendants made calls upon the plaintiff as owner of the *Hermione*, and a member of the society; but when the ship is lost, the defendants refuse to pay the insurance, and it is contended that the plaintiff, who caused his interest in the ship to be insured, cannot recover for the loss as a member of the defendants' society, on the ground that he never, in fact, signed a copy of the articles. The answer is obvious; that as the directors choose to accept an insurance on the *Hermione*, and thereby made the owner a member

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Blackburn, J.

of the society, and treated him as such, and made calls on him as such, they are precluded from saying that he is not a member of the society because he has not signed a copy of the articles. They have dispensed with the necessity of the plaintiff signing a copy of the articles, for they have treated him and dealt with him as if he had signed.

With regard to the third point. Davies was the registered owner of the *Hermione*, and after the insurance had been made he conveyed the legal interest in the ship to the plaintiff, whose equitable interest then became a legal interest. Article 63 provides in effect that, when a member of the society sells a vessel which is insured by the society, he shall not sell the policy with it, and the purchaser is not entitled to recover or to be indemnified for any loss which may have happened after the sale. It is said, that, inasmuch as the legal owner, Davies, had transferred the legal interest in the ship to the plaintiff, who had the equitable interest, the transfer was the sale of a vessel by a member of the society. But that is not so. The fact that the plaintiff turned his equitable interest in the ship into a legal interest, does not bring this case within the purview of Article 63. It is neither within the spirit nor the words of that clause. On these three points we give our judgment for the plaintiff.

As to the last point, which is the main contention in the case, our judgment must be for the defendants. The document issued by the defendants does not expressly state what perils they undertake to insure against. It certifies that Edwards, as ship's husband for the *Hermione*, has paid a sum of money for the insurance on the vessel. It refers to the articles of association; it regulates the times at which at certain seasons of the year vessels shall sail for certain specified ports; it contains provisions, if at particular times the vessel meets with an average loss, what deductions shall be made; and it states that every insurance effected shall be valid and binding from twelve o'clock of the noon on the day on which the insurance is effected, until twelve o'clock of the noon on the 1st of January then next following. The whole document points to this: that the parties are entering into a contract of indemnity—an insurance against marine perils during a period from the date of the policy to the 1st of January in the

following year. Nothing, however, is expressly stated as to what perils the plaintiff was to be insured against, but I have no doubt that it was intended that the plaintiff should be indemnified against loss from the ordinary underwriters' perils. Neither have the defendants anywhere in express terms stated that they will pay any money; it is to be implied, from the fact of their having in effect entered into a policy of marine insurance, that there is to be an indemnity. Then we are to look at the articles of association to ascertain how the indemnity is to be settled and paid by the defendants to the members of the society. This is provided for by article 39, which confers full power on the directors to adjust, settle, and decide all claims and demands upon the society by the members thereof. So far it is clear that the indemnity is to be settled by the directors, who are to be the arbitrators. And then it provides that no member of the society shall be allowed to bring or have any action . . . for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents. Now, what did the parties mean by this article? It has been decided by numerous cases, all of which are referred to in *Scott* v. *Avery* (1), that where a person has entered into an agreement, a breach of which would give him a cause of action in a court of law, and the same document contains a clause that all disputes arising between the parties shall be referred to the arbitration of a particular person, such a stipulation is not a bar to an action, or, as it has been phrased, does not oust the courts of their jurisdiction; but it has been decided in the case of *Scott* v. *Avery* (1), that where parties have entered into a contract of indemnity, they may, if they choose, agree that in the event of any loss occurring, such loss shall be ascertained by any arbitrator that they may select, and they may agree to pay such loss when it has been ascertained, and not otherwise. That is as I understand the principle of *Scott* v. *Avery*. (1) This principle has been acted on in several cases, in which sometimes it has been held that ascertaining the loss is a condition precedent to bringing an action for the amount, and sometimes not. In the present case we have a mutual insurance club; all the members mutually agree to insure the vessels of

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Blackburn, J.

each other. It is by no means improbable that they should say: In doing this we do not intend that we, who are members of the same club, shall litigate with each other: what we do intend is, that the directors of the society shall decide finally what the loss incurred by any one member may be, and we shall pay upon the decision of the directors. And then article 84 provides that if any member is dissatisfied with the decision of the directors, and he can get ten members to agree with him, the directors will have to re-consider their decision; and if he is still dissatisfied with the second decision, he may, together with twenty members, summon a special general meeting of the society to reconsider the directors' decision. Now, assuming that to be the intention of the parties, and considering the words that they have used, it does seem to me that the members who have entered into the society have agreed that the indemnity to be paid shall be determined in that particular mode—it shall be determined by the directors, subject to those two appeals; and the promise of the defendants is to pay an indemnity which has been determined in that way, and not otherwise. We must not expect, in construing these articles, to find a case expressly in point, but I think *Tredwen* v. *Holman* (1) comes as near as possible to this case, and I have come to a similar conclusion to that of the Court of Exchequer, viz. that the parties have agreed that the members shall be indemnified by recovering such sum as the directors, subject to the appeals given by the rules, decide that the society ought to pay.

Mellor, J.

MELLOR, J. I am of the same opinion. I agree that the first three points must be answered in favour of the plaintiff. But with regard to the main point, I think the case falls within the rule laid down in *Tredwen* v. *Holman*. (1) I think it is quite competent for the society to establish a domestic forum that shall decide all disputes which shall arise between the members, and that they shall not resort to a court of law until they have proceeded according to the rules to which they are all parties. No doubt the language in rules 83 and 84 is somewhat obscure, but on the whole I think the defendants have made a provision by which the plaintiff is prevented from suing in the present action.

(1) 1 H. & C. 72; 31 L. J. (Ex.) 398.

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

LUSH, J.

LUSH, J. I am of the same opinion. I agree with the judgment of my Brothers Blackburn and Mellor upon the first three points that have been made. As to the objection that the plaintiff was not a member of the company, I think, although he had never signed the articles, the defendants have so dealt with him as to estop themselves from saying that he was not a member entitled to the rights of a member and subject to the liabilities of a member. The substantial question is, what is the nature of the contract which is expressed in the policy, is it a conditional or an absolute contract? I have come to the conclusion that it is not an absolute contract, but conditional, and the conditions are to be ascertained by reference to the articles of association. The policy professes to have been issued by a mutual ship insurance society limited—a society, therefore, which is governed by articles of association, and the articles of association are twice referred to in the body of the document which is the policy. The part that contains the contract is in these terms: "This is to certify that Mr. Evan Edwards, as ship's husband for the *Hermione*, 162 tons, A 1, Red, whereof is master at the present time Daniel Davis, has this day paid 17*l.* 10*s.* for the insurance of fifty-two shares, 1000*l.*, in the said vessel." That is all. How the loss, when a claim has been made, is to be ascertained, what amount is to be ultimately paid by way of indemnity, or when the payment is to be made, are all left to be inferred from the articles of association. There is no express contract on the face of the policy; it is only a certificate that the plaintiff was insured for a given amount. We have to refer to the articles of association to learn in what way the parties intended that the amount of loss should be determined and payment made. Then, upon looking at Articles 83 and 84, I have no doubt whatever that the contract was a qualified one; it is: "We hold your vessel to be insured subject to the terms expressed in the articles of association;" and those terms are that in case of loss, or a claim for loss, the whole matter is to be investigated by the directors, the amount payable, if any, is to be ascertained by them, and their decision is to be final, subject only to the right of appeal which has been already adverted to. This being so, the case is clearly within

1875-6

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Scott v. *Avery* (1), and the plaintiff cannot maintain an action in this Court in express variance with the terms upon which he accepted the policy from the directors.

Judgment for the defendants.

On error by the plaintiff to the Exchequer Chamber.

Ex. Ch.

1875. May 10, 11. *Cohen, Q.C.* (*Kenelm Digby* with him), for the plaintiff.

W. Williams, Q.C. (*B. T. Williams* with him), for the defendants.

Cur. adv. vult.

1876. Feb. 26. The following judgments were delivered:—

Amphlett, B.

AMPHLETT, B. The facts are sufficiently stated in the case and exhibits.

Two points were relied upon in the argument before us on behalf of the defendants: 1. That the plaintiff was insured, if at all, upon the terms of the articles; 2. That under Articles 39, and 83 and 84, it was made a condition precedent to his right to bring an action that the amount of his claim should be determined by the directors.

On the first point, in my judgment, the defendants are right. The plaintiff knew that he was dealing with a registered society, and the articles are referred to in the contract signed by the directors in a manner which, I think, clearly shows that both parties intended to contract on the footing of the articles. In fact, unless the articles are considered (as I think they ought to be) incorporated, the contract would be altogether invalid for (among other reasons) the omission therein of any enumeration of the perils insured against.

On the second point, I think that, upon the true construction of the articles, it must be taken to have been the intention of the parties to give exclusive jurisdiction to the directors to settle all claims between the society and its members, and the question whether an agreement to that effect is void as being against the policy of the law is, in my judgment, concluded by the decision

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

of the House of Lords in *Scott* v. *Avery*. (1) It is true that in the present case the directors are to decide not the mere amount of the claims, but also any dispute that might arise respecting insurances, but so they were in *Scott* v. *Avery* (1), and both the learned Lords who decided that case held such extension of the powers of the directors to be immaterial.

Under these circumstances it is not necessary to consider at length the subsequent decisions of inferior Courts. I may, however, refer to *Tredwen* v. *Holman* (2); *Elliott* v. *Royal Exchange Assurance Co.* (3); *Dawson* v. *Fitzgerald* (4); the first of which is, in my judgment, undistinguishable from the present case.

I think, therefore, that this action cannot be maintained, unless it can be shewn that the conduct of the directors, in the so-called arbitration, has made it inequitable to compel the plaintiff to submit his claim to their determination. Hence the conduct of the directors in this respect has become very material, and requires a minute examination. The facts are to be found in paragraphs 11, 12, and 13, of the case, which are as follows:—

[The judgment then set out those paragraphs.]

In my opinion, these proceedings of the directors were unjustifiable, and can only be accounted for, consistently with honesty and good faith, by supposing that they had mistaken their real position, and supposed that, being agents of the society, they had no duty to perform towards the plaintiff.

It is beyond doubt, however, that when they undertook the delicate task of adjudicating between their own society and a member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties: *McIntosh* v. *Great Western Ry. Co.* (5) To come to a decision under these circumstances in favour of their own society, and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not, I think, to be held, by any Court of Law or Equity, to be binding upon him.

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.
(2) 1 H. & C. 72; 31 L. J. (Ex.) 398.
(3) Law Rep. 2 Ex. 237.
(4) Law Rep. 9 Ex. 7; reserved on appeal, 1 Ex. D. 257.
(5) 2 De G. & Sm. 758, 769.

(1) SC 2 Jur. N.S. 815
(2) SC 8 Jur. N.S. 1080

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Amphlett, B.

Moreover, I think that it would be unreasonable to compel the plaintiff now to submit his claims again to the directors, they having already prejudged the case in his absence. It is hardly likely that, after what has occurred, the directors could now approach the subject with that even and unbiassed mind which is, as the Vice-Chancellor said in *Kemp* v. *Rose* (1), essential to the validity of every judicial proceeding.

If the matter had rested only on the first meeting of the directors on the 6th of January, 1871, it might have been suggested that the directors, having had no notice of the transfer of the vessel to the plaintiff, considered Davies as the owner; and thought it sufficient to have him before them; but it did not rest there, for no notice of that resolution was ever given either to Davies or to the plaintiff, nor was any notice given to either of them of the subsequent quarterly meeting to which the notice signed by ten members was submitted, and at which the same resolution was confirmed in the absence of both. I infer from these facts that the attendance of Davies, who, as I said before, was master of the lost vessel, was requested as a witness and not as the supposed owner, and his presence, therefore, at the first meeting does not alter the view I have taken of the directors' conduct in the matter.

But it is said that the determination of the directors having been made a condition precedent to bringing an action, a Court, at law at least, cannot interfere, as that would be making a new contract for the parties. I think there is a fallacy in this argument. Courts of Equity have no more power to make new contracts for parties than Courts of Law, and yet they would undoubtedly interfere when a contract is performed on one side and the mode agreed upon for ascertaining the amount to be paid by the other has failed in any way without the plaintiff's fault. Put the simple case, which is in principle the same as that we are considering: A. contracts to do work for B., the price to be determined by the engineer of B. The work is done, and before the price is determined the engineer, by some act of his own not necessarily fraudulent, becomes incapacitated to act as arbitrator. I cannot persuade myself that Courts of Law are powerless to prevent the gross

(1) 1 Giff. 258, 264.

injustice of B. having the benefit of the work, without compensation to A., except by the inconvenient and often ineffectual course of bringing an action for neglect of duty against the engineer and his employer. To give direct redress in such a case seems to me only another application of the well-known principle, that a man shall not take advantage of his own wrong, under which even precedent conditions, in their strictest sense, have been held to be discharged where performance was prevented by the defendant himself: see Comyns' Digest, Condition (L. 6.); and the case of *Hotham* v. *East India Company.* (1) Courts of Equity have concurrent jurisdiction, even in respect of legal claims, with Courts of Law in cases of fraud, and they appear to have assumed jurisdiction in the sort of cases we are considering, on the ground that where the acts of the defendants which prevented the amount of the plaintiff's claims being ascertained in the agreed mode were not in themselves fraudulent, yet they would become fraudulent if used for the purpose of defeating the plaintiff's rights: see *McIntosh* v. *Great Western Ry. Co.* (2) It most frequently happens that the circumstances of these cases are complicated, and can be more conveniently investigated in a Court of Equity than in a Court of Law; but in a case like the present, where a Court of Law can do complete justice by simply disallowing a defence founded on the failure of the agreed arbitration, here the act of the directors, the convenience is quite the other way; and I can see no reason why a Court of Law should not determine the matter themselves.

For these reasons I think that the plaintiff can sustain his action; and there is no difficulty about the amount, as it is found in the case (paragraph 14) that the defendants now admit, contrary to what their directors had determined, a total loss of the vessel by perils of the sea.

The decision of the Court below is, therefore, in my opinion, erroneous and ought to be reversed; and judgment entered for the plaintiff for 1000*l.*, with interest and costs of suit.

POLLOCK, B. This action is brought by the plaintiff as owner of a vessel called the *Hermione* against the defendants, who are a

Pollock, B.

(1) 1 T. R. 638.

(2) 2 De G. & Sm. 758; and on appeal, 2 Mac. & G. 74, 95; 19 L. J. (Ch.) 374.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Pollock, B.

limited company for the mutual insurance of ships, to recover upon an insurance effected with the defendants, whereby the *Hermione* was insured from the 24th of February, 1870, to noon of the 1st of January following.

The defendants admit that the *Hermione* was insured, and also that there was a total loss; but they contend that the plaintiff can maintain no action against the company until he has complied with the company's articles which relate to the adjustment and settlement of losses. The plaintiff alleges that the document by which the insurance was effected gives him a right of action independently of these articles.

[The judgment then set out the material facts and the policy.]

Except by the reference "Vide Article 70," and the words "as per rule for this class," there is no allusion to any articles or rules other than those contained in the document dated the 24th of February, 1870; and the last-mentioned rule is contained in the articles and repeated in the document.

The defendants' society was, however, governed, by a memorandum of association and by articles of association dated December, 1864, which contained, in all, ninety-eight articles. These provide for the constitution of the society, the duties of its directors, rates of insurance, and other matters usually found in the rules of a mutual insurance society, and many of those relating to the terms of insurance are repeated in the document which was given to the plaintiff on his paying his premium in February, 1870. Amongst those not so repeated are the following:—

[The judgment then set out Memorandum of Association, paragraph 3; Articles of Association, Arts. 3, 39, 83, 84.]

No copy of these articles was furnished to the plaintiff. He had not read them, nor did he know their contents. It was contended for the defendants that this was immaterial, because by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16, the articles of association, when registered, are binding on members as if each member had signed and sealed them, and there was a covenant in this case on his part to conform to all the regulations contained in them. This contention, in my judgment, fails, for s. 23 defines members to be persons who have agreed to be members, and whose names are entered on the register of members; the plain-

tiff's name was not so entered, and he is not made a member by the statute.

Under these circumstances, the first question that arises is, what was the contract between the plaintiff and the defendants? and I will consider this at present apart from the Stamp Act.

It appears to me to be extremely doubtful whether a complete contract of insurance could, under any circumstances, be gathered from the document dated the 24th of February, 1870, taken by itself. At best, it is rather in the nature of a receipt for premium than a policy; and it contains no covenant or contract for payment. But however this may be, it is, I think, clear that those who signed it had no authority to bind the company to any contract of insurance other than what is contemplated and provided for by the articles. If, therefore, the document in question stood alone, the result would be that there would be no contract with the company. The document is, however, headed "Aberayron Mutual Ship Insurance Society, Limited," and therefore denotes that the object of the society is the mutual insurance of ships belonging to members. It has reference to one article not contained in it, and in its form it resembles rather a certificate that a contract exists than a contract itself. From what is expressed, and also from what is absent, the plaintiff must, I think, have been aware that it did not contain all the terms of the proposed insurance as to adjustment and settlement, and the defendants are entitled to present to the plaintiff the dilemma that either there is no contract or the contract is that which they admit, namely, an insurance subject to the articles. We have power to draw inferences of fact, and the proper inference appears to me to be that the plaintiff has entered into a contract, which is evidenced by the document dated the 24th of February, 1870, and the articles of association. When the latter are referred to, what is deficient in the certificate is supplied. For, although there is no undertaking to pay to the assured upon a loss so as to give an immediate right of action,—as indeed there never is by the rules of a mutual insurance society,—Articles 39, 83, and 84, provide for a member who has any claim giving notice thereof; for the summoning of a board of directors to examine into it, and for their decision thereon; and, further, that

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

POLLOCK, B.

if the member is dissatisfied, he may, if ten other members will join him, summon a second board of directors to reconsider their decision, and if he is dissatisfied with the decision on appeal, he may, if twenty members will join him, appeal to a special general meeting, who may confirm or vary the decision.

It was strongly argued on behalf of the plaintiff that the effect of the decision of the Court below would be to deprive the plaintiff of his right to resort to the Courts of law to enforce his rights, and the well known arguments against ousting their jurisdiction were resorted to. If, however, the view I take of the articles be correct, no such objection arises, because their effect is not to substitute a special tribunal to deal with an existing cause of action, but to provide by the contract between the parties, upon which alone any claim of the plaintiff is based, a mode by which that claim shall be established, and which must be pursued as a condition precedent to any right to payment arising. There is no more displacement of a cause of action or ousting of jurisdiction than there is when parties agree that a builder shall be paid such a sum as an architect shall name; and the case comes within the principle acted on in *Scott* v. *Avery* (1), *Tredwen* v. *Holman* (2), and *Elliott* v. *Royal Exchange Assurance Co.* (3), and not within that by which the Court was governed in *Horton* v. *Sayer*. (4) The distinction between the cases is well pointed out by Bramwell, B., in *Tredwen* v. *Holman* (5), where he says: "If a tenant covenants that he will cultivate the demised land in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them." And, again, in similar language, in *Dawson* v. *Fitzgerald*. (6)

Before leaving this part of the subject I must not omit, however, to notice the construction of Article 39, that was pressed upon us by Mr. Cohen as counsel for the plaintiff. The article

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.
(2) 1 H. & C. 72; 31 L. J. (Ex.) 398.
(3) Law Rep. 2 Ex. 237.
(4) 4 H. & N. 643; 29 L. J. (Ex.) 28.
(5) 1 H. & C. at p. 79.
(6) Law Rep. 9 Ex. at p. 10.

provides that "no member shall be allowed to bring any action, suit, or proceeding, or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society, or the members thereof, except as is provided by these presents." He argued that these latter words were intended to preclude a member from bringing any action against the society, even where his loss has been adjusted by the directors, and they declined to pay.

It appears to me, although the language used is not very clear or accurate, that the intention of the parties is limited to requiring that members having claims on the society shall proceed according to the mode of proof pointed out by the articles, and that if all conditions precedent were fulfilled, and the decisions of the directors was obtained in favour of the claimant for a specific amount, an action would well lie against the society if they refused to pay it.

I have hitherto dealt with the question apart from the Stamp Act, 30 & 31 Vict. c. 23. Sect. 7 of this Act provides that "no contract or agreement for sea insurance shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured"; and by s. 4 the word "policy" is declared to mean "any instrument whereby a contract or agreement for any sea insurance is made or entered into."

The object of this enactment is to prevent persons obtaining the benefit of a marine insurance without paying stamp duty. It clearly does not make any particular form of policy compulsory; else it would have referred to as essential the form mentioned in s. 5 and schedule E, which the Commissioners of Inland Revenue are thereby bound to provide, nor does it forbid companies or underwriters importing into their stamped policies, by reference or otherwise, terms which are not expressed in them: provided the risk and other matters mentioned in s. 7 are contained in a stamped policy. It seems to me, therefore, that the document dated the 24th of February, 1870, satisfies the requirements of and is sufficient as a policy within the Stamp Act, although terms exist relating to the adjustment and settlement of any loss that

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Pollock, B.

may arise under it which are not contained in it, and yet are binding on the plaintiff.

To apply to this case the well-known principle acted on in *Boydell* v. *Drummond* (1) would be, I think, unnecessary and unreasonable, for there is no such reason for the exclusion of parol evidence to connect the various documents which are intended together to constitute the contract or policy of insurance as there is in the case of contracts within the Statute of Frauds.

Although, therefore, the inartificial manner in which the policy and rules are drawn creates some difficulty, I find it satisfactory to arrive at a conclusion which supports what was the substance of the transaction, and prevents the plaintiff setting up a contract which it is obvious he could not himself have contemplated, and which certainly could never have been intended by the defendants, as it would have been a departure from the fundamental principles and the daily practice of the company.

For these reasons the judgment of the Queen's Bench should, in my opinion, be affirmed.

My Brother Archibald agrees in this judgment.

Brett, J.

BRETT, J. This was an action to recover for a total loss on the vessel *Hermione*.

[The judgment then stated the facts, and the contentions of the defendants, as set out in the case.]

Upon the argument before us, it was contended, on behalf of the plaintiff, that there was a valid contract of insurance; that the contract was to be found solely in the document of March, 1869; that such document did not incorporate the articles and rules of the association; that, whether it did or not, the plaintiff's right to maintain the action was not abrogated; for that rule 39 was no answer to the action, being an attempt to set up a private tribunal to try a right of action accrued; and that no such decision by the directors or the meeting as was relied upon could affect the plaintiff, who had not been summoned or heard when it was arrived at. It was admitted, on behalf of the defendants, that there was a contract of insurance contained in a valid policy; and that there was a total loss; and that the plaintiff was a member of the asso-

(1) 11 East, 142.

ciation; but it was argued that the policy consisted, not only of the document of March, 1869, which, if it stood alone, was no policy at all, because in it the risk was not sufficiently specified, but of that document and the articles and rules; that by the rules the plaintiff was bound to submit his claim to the decision of the directors, subject to an appeal to a quarterly and a general meeting; that no right of action accrued to any member in respect of a loss, unless he could obtain from the directors or the association a decision in his favour, that his claim was valid and to a certain amount; that the plaintiff had not obtained such a decision; that the adverse decisions of the directors and the quarterly meeting were final; and that the plaintiff therefore never had a cause of action against the defendants. Several points argued in the Court of Queen's Bench were not argued before us.

The questions before us are, first, is the document of March, 1869, to stand alone as the policy, or are it and the articles and rules, or some of them, to be read together, and so to form a policy in writing? Secondly, if the document of March, 1869, is to stand alone, is it a valid policy in writing? Thirdly, do the rules, if they are to be considered as no part of the policy, prevent the plaintiff from maintaining this action? Fourthly, do they prevent the plaintiff from maintaining the action if they are to be considered as part of the policy?

As to the first question, it was argued that there is no contract of insurance here, unless it be formed by the document of March, 1869; that such document contains no reference to the rules, which are said to prevent the plaintiff from maintaining the action, and therefore does not incorporate them. And the case of *Boydell* v. *Drummond* (1) was cited. That case was decided on the Statute of Frauds. The ground of decision was, that separate documents in writing could not be joined together to make a memorandum in writing within that statute, unless there was a sufficient reference from one writing to another contained in the documents themselves to shew that they were intended to be jointly the memorandum, without being obliged to have recourse to parol evidence to shew such intention; for otherwise the danger from parol evidence would arise, which it was the intention of the statute to

(1) 11 East, 142.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

obviate. That ground of decision is applicable only when the question is, whether there is or is not a sufficient memorandum within the Statute of Frauds. It does not seem to me to be applicable to a question, whether there is a sufficient policy of assurance in writing, or as to what documents form that policy. I see no reason why parol evidence should not be admitted to shew what documents were intended by the parties to form an alleged contract of insurance. It seems to me in the present case obvious, as an inference of fact from the whole relation between the parties (and we have power to draw inferences of fact), that the intention was that the contract of insurance should be found not alone in the document of March, 1869, but in it and such of the rules as are applicable to a contract of insurance.

Such being my opinion, it is unnecessary to determine the second question. Still my opinion is that there is nothing in the Stamp Act to prevent the document of March, 1869, from being considered as a valid policy. I agree with the interpretation of the Stamp Act contained in the judgment of Blackburn, J., in this case in the Queen's Bench. Neither is it necessary to determine the third question. Though here again I should think it plain that if the articles and rules are a separate contract from the policy, no agreement in them, however strong and absolute not to sue, could prevent the plaintiff from maintaining an action on the separate policy or contract of insurance.

The fourth is therefore the main question in this case. It seems to me to raise these points: What is the contract as to payment in case of loss? What is the stipulation as to the assured suing in a court of law or equity? What is the limit of the rule of law established by the case of *Scott* v. *Avery* (1),—does it prevent the maintenance of the present action? Now as to the first, there is no express stipulation as to any payment being due in case of loss in the document of March, 1869. Neither is there any in the articles of association. Those articles contain rules for the management of the society and rules as to the making of contracts of insurance, and rules which, as I have said, form, in my opinion, parts of the contract of insurance. With the rules which deal solely with the management of the society we are not concerned.

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

Those which are applicable to the making of contracts of insurance, are rule 28, which primarily gives the power of making such contracts to the directors; rule 40, which gives authority to the directors to delegate the power of signing policies to two directors and the chairman, and enacts that no policy but one so signed shall be binding on the society; and rule 53, which adds further restrictions. These rules shew that there would be no valid insurance in this case without the document of March, 1869; but do not, in my opinion, prevent the incorporation into or adjunction to that document, as part of the contract, of such rules as are applicable to the contract. Rules which thus form part of the contract are, amongst others, rule 61, which shews that the society insures, not only against total loss, but also against partial loss or damage if to a certain amount; and rule 83, which, by a necessary implication, discloses the perils insured against, including loss or damage by collision. I do not doubt that rules 39 and 84 are also included in the contract, and form part of the policy. What, in my opinion, is the true construction of them, I will presently state. But for the present I observe that neither of them contains any express undertaking to pay in case of loss, or to pay at any specified time. There is no rule which has any express stipulation to pay anything in case of loss. But then there never is any such express stipulation in any policy of marine insurance in ordinary form. A Lloyd's policy contains no such express stipulation. It has always been implied that a liability to indemnify arises directly there is a loss or damage by a peril insured against, unless such liability is prevented by some stipulation or condition expressed or implied in the policy. In the policy, therefore, in this case, it is to be implied that such liability to indemnify arises directly a loss or damage is caused by a peril insured against, unless the true construction of rule 39 is that it postpones the attaching of liability to a later time, or makes it depend upon another event than a loss or damage caused by a peril insured against. The first rule applicable to events in order of time after an alleged loss or damage is rule 83. "In all cases of any vessel, &c., being lost, &c., the owner, master, or mate, or some of the crew, shall, as soon as circumstances will permit, give notice thereof to the secretary, &c.; and the directors shall proceed to examine

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

the owner, master, and mate, and such of the crew as they shall think necessary, *as to the cause of such loss or damage*, and shall make such further inquiries and take such measures and make such decisions and regulations thereon as in their judgment the case shall require." There is to be inquiry and decision, not merely as to the amount of loss or damage, but as to the cause of loss or damage. This seems to me to assume to give power to decide whether the loss was or was not caused by a peril insured against, so as to decide whether the society is or is not liable for the loss or damage in respect of which a claim was made. By rule 84, "If any member shall be dissatisfied with the *decision of the directors*," amongst other things, "as *to any claim or other matter decided by the directors*," he may appeal to a special general meeting. And by rule 39, the directors shall have full power, amongst other things, "*to decide and determine all disputes*, controversies, and matters arising between the society and members of the society *concerning insurances or claims upon* or liabilities *by the society*." These confirm and strengthen the view that it was intended that the directors should decide and determine, not only the amount for which the society should be liable, if a liability could be proved, but the question whether there was or was not any liability. And it was upon the latter view that the directors in the present case assumed to decide and determine that the society was not liable to the plaintiff. The next question is, what is the effect endeavoured to be given by the rules to the decision of the directors or of the general meeting of the society? By rule 39, "and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof." That is to say, a decision as to whether the society is or is not liable at all is to be final and conclusive. Then the rule continues: "And no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." The rule then provides that the directors may, if they think fit, cause "*any of such claims*," i.e., any claim upon the society concerning insurance, i.e. the whole claim, "to be referred to the decision of any person practising as an average

adjuster." The powers given to this person are clearly to be exercised judicially, as if by a tribunal. "And the decision or award of such average adjuster shall be final and conclusive on the society and claimant; and no appeal shall be allowed therefrom." And so by rule 84, "Whatever shall be decided by the special general meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision." These inquiries and decisions are not confined to the question of amount, contingent on a liability being admitted or established. They may, so far as I can see, take place where the amount is not in dispute, if a liability be established, but also where the liability is disputed. The terms are certainly wide enough to include every question which may arise upon any claim by a member for any alleged loss under a policy. They assume a claim in respect of any alleged right, a dispute as to the validity of such claim, an inquiry into such dispute, and a decision which shall be final and conclusive. If the decision ought to be arrived at after hearing evidence and the parties, it is a judicial decision. If so, it seems difficult, if not impossible, to say that there is not an attempt and intention to form a private tribunal, which is to replace the ordinary tribunals of the country. The stipulations as to the procedure before the average adjuster shew that those who drew the rules intended that there should in all the inquiries be a judicial investigation before a tribunal; which is therefore a judicial tribunal. These rules do not seem to me to confine the inquiry and decision of which they treat to the amount to be paid, leaving the liability to pay to be established before the ordinary courts, or merely to postpone the liability to pay until the amount to be paid has been determined by the directors or an arbitrator: they do not affect the time of payment in respect of a loss; they do not therefore alter the implied contract to indemnify directly a loss arises; they leave that contract to be independent; they deal no more with that than with any other stipulation in the contract of insurance; but they are, as it seems to me, intended to create a tribunal to hear and determine every question which may arise in respect of a policy made with the society, and to determine everything finally and compulsorily, so as to prevent any application to the ordinary courts.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

Then arises the question what is the law? I agree with Martin, B., in *Horton* v. *Sayer* (1), that if the decision in *Scott* v. *Avery* (2), in the House of Lords, is to be interpreted according to the opinion expressed therein of Lord Campbell, the former cases are overruled, and the doctrine previously maintained with regard to ousting the jurisdiction of the ordinary Courts is exploded. But I do not think it is possible to say, that the decision of the House of Lords did overrule the former decisions. Baron Martin thought it did. He so stated in *Horton* v. *Sayer* (1), and so in terms ruled in *Tredwen* v. *Holman.* (3) The facts in *Scott* v. *Avery* (2), as interpreted, did not make it necessary to decide more than this, that there may be a valid and binding contract that no action shall be maintained until the amount of damage, if any, has been ascertained in a specified mode. "It appears to me perfectly clear," said the Lord Chancellor, "that the language used indicates this to have been the intention of the parties, that, supposing there was a difference between the person who had suffered loss or damage and the committee *as to what amount* he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." This ruling, as it seems to me, in no way conflicts with a right in either party to litigate before a court of law or equity any other question than the amount of damages which might arise under, or in respect of, the contract. The terms of the rule in that case were not the same as in this. They were, first, "that the sum to be paid to any suffering member for any loss or damage shall, *in the first instance*, be ascertained and settled by the committee." And then, "that no member, who refuses, &c., shall be entitled to maintain any action at law or suit in equity on his policy *until* the matters in dispute shall have been referred, &c., and then only for such sum as the said arbitrators shall award; and the obtaining the decision of

(1) 4 H. & N. at p. 650; 29 L. J. (Ex.) at p. 32.

(2) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(3) 1 H. & C. 72; 31 L. J. (Ex.) 398.

such arbitrators on the matters and claims in dispute is *hereby declared to be a condition precedent* to the right of any member to maintain any such action or suit." These terms seems rather to assume than to forbid the possibility of an action or suit upon questions other than the amount. "There is no dispute as to the principle," says Coleridge, J., in the Exchequer Chamber. (1) "Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the *amount of damage* or the *time of paying it*, or any matters of that kind, *which do not go to the root of the action*. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the Courts of their jurisdiction, cannot be supported." And, in order to form and support the judgment, the large terms in that case were by reference confined so as to be applied to a reference of the amount only, and not of the liability. In *Horton* v. *Sayer* (2) the stipulations in the lease were, "that if at any time during the said term, or at, or after the expiration thereof, any difference should arise touching or concerning any covenant, &c., *all and every the matters in difference* should be finally settled by arbitration. And every such award should be binding and conclusive. And that the parties should not commence or prosecute any action or suit, or seek any remedy, either in law or equity, for relief in the premises without first submitting to such arbitrator as aforesaid *all matters in difference*," &c. It is obvious that in those stipulations the arbitration was not confined to settling an amount of damages, but was general. "In this case," says Pollock, C.B., "the deed discloses nothing more than an agreement generally to refer *all disputes* to arbitration, and that does not prevent the plaintiff from maintaining this action." And Bramwell, B., says, "I think *Scott* v. *Avery* (3) was rightly decided, though perhaps I may have some bias in consequence of having been counsel for the plaintiff. The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, that is the case with reference to

(1) 8 Ex. at p. 500. (2) 4 H. & N. 643, 650, 651; 29 L. J. (Ex.) 28.
(3) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

which the Courts have used the unfortunate expression that their jurisdiction is ousted by the agreement of the parties. On the other hand, if a man covenants to do a particular act, and that in the event of his not doing it the other party shall be entitled to receive such a sum of money as they shall agree upon, or if they cannot agree, such an amount as shall be determined by an arbitrator, there is no debt which he can be sued for until the arbitrator has ascertained what sum is to be paid." He then decides in favour of the plaintiff, because "there is a distinct and unqualified covenant by the defendant that he will do a particular act, and also a covenant that, if *any difference* shall arise, it shall be referred to arbitration." It is impossible, as it seems to me, to have a more clear statement that *Scott* v. *Avery* (1) did not overrule the former decisions. And the case is an authority that the distinction is between an agreement to refer a particular point as a condition precedent to an action, and to refer all matters in dispute so as to leave no action.

In *Roper* v. *Lendon* (2) the tenth condition in a fire policy was: "the amount of every loss will be paid immediately after the same shall have been established to the satisfaction of the directors." The fifteenth condition was: "In case *any difference or dispute* shall arise between the insured and the company touching any loss, &c., or otherwise in respect of any insurance, such difference shall be submitted, &c., and the award shall be conclusive and binding on all parties." The sixth plea relied on the fifteenth condition. Mr. Lush, arguing for the defendants, admitted that the sixth plea was bad. This of itself is high authority. Lord Campbell, giving judgment, said: "The sixth plea is clearly bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The Courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like *Scott* v. *Avery* (1) is plainly pointed out in the judgment there delivered in the House of Lords. The present case does not fall within that decision," &c. And Hill, J.: "The sixth plea is bad. The case is clearly not within the decision in *Scott* v. *Avery*. (1) Here the agreement to refer is collateral

(1) 5 H. L. C. 811. (2) 1 E. & E. 825, 830; 28 L. J. (Q.B.) 260.

to the agreement to pay; there the agreement was to pay *only such a sum as the arbitrators should award.*" This seems to me a conclusive statement, by or with the assent of Lord Campbell—on whose judgment in the House of Lords reliance was placed for the proposition that the doctrine as to ousting the jurisdiction of the Courts is abrogated—that *Scott* v. *Avery* (1) did not overrule that doctrine, that it still exists, and that the test is whether the agreement to refer applies only to the ascertaining a particular fact or to the decision of every dispute which may arise. In *Cooke* v. *Cooke* (2) Sir P. Wood thus discusses *Scott* v. *Avery* (1): "These observations of Lord St. Leonards have been commented on by the present Lord Chancellor in *Scott* v. *Corporation of Liverpool* (3), which fell within the principle of *Scott* v. *Avery*. (1) A simple case, where a contractor had agreed that he should be paid only when the engineer should certify; and it was held, that there was no right of action until the certificate was made. But the Lord Chancellor distinguishes that simple class of cases from the other, where a distinct right, such as a debt, or an obligation to account has arisen, and the parties have agreed upon a particular private tribunal which shall adjust the right for them. Speaking of the latter class of cases, the Lord Chancellor says: 'A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals.'" But the case of *Tredwen* v. *Holman* (4) is said to be contrary to these views. The stipulation in the policy was, "and all *other causes of dispute, of whatever nature,* shall be referred in like manner; and no action at law shall be brought, until the arbitrators have given their decision." The Court decided in favour of the defendants. Martin, B., in delivering the judgment, said: "The case of *Scott* v. *Avery* (1) decided that the insurer and the underwriter may contract that no right of action (to be enforced in a Court of law) shall accrue until an arbitrator has decided, not merely as to the amount to be recovered, but upon any dispute that may arise upon the policy. . . The agreement is clear and

(1) 5 H. L. C. 811.
(2) Law Rep. 4 Eq. 78, 85.
(3) 3 De G. & J. 334, 360.
(4) 1 H. & C. 72, 80; 31 L. J. (Ex.) 398.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

unambiguous, and the parties probably meant to act upon *Scott* v. *Avery* (1), and exclude the jurisdiction of the Courts of law except for the purpose of enforcing the award to be made by the arbitrator." This judgment seems to me to be founded upon the view maintained by Martin, B., that the judgment in the House of Lords in *Scott* v. *Avery* (1), which was contrary to the opinion given by him in that case, overruled all the previous decisions on the subject. "It seems to me," he said, in *Horton* v. *Sayer* (2), "that *Scott* v. *Avery* (1) has overruled all the previous decisions on the subject." As I cannot accede to this view, I venture to say that *Tredwen* v. *Holman* (3) cannot be supported. The true limitation of *Scott* v. *Avery* (1) seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, i.e. which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract, which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages, probably nominal. And the rule is founded on public policy. It in no way prevents parties from referring disputes, which have arisen, to arbitration; but it does prevent them from establishing, as it were, before they dispute, a private tribunal which may from ignorance do what the invented tribunal here did, namely, act in contravention, and insist on acting in contravention, of the most elementary principles of the administration of justice.

In this case, upon a careful consideration of such of the rules in

(1) 5 H. L. C. 811. (3) 1 H. & C. 72, 80; 31 L. J. (Ex.) 398.
(2) 4 H. & N. at p. 650; 29 L. J. (Ex.) at p. 32.

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Brett, J.

the articles of association as are, in my opinion, parts of the written contract of insurance, I come to the conclusion that there is nothing to postpone the attaching of the implied liability to indemnify for a loss to any time subsequent to the loss, that the stipulations as to arbitration by the committee or meetings would, if carried out according to their terms, prevent the assured, under any policies of the society, from maintaining any suit or action at all in the ordinary Courts of the country in respect of any dispute arising on the policy; and, therefore, that such stipulations do not prevent the plaintiff from maintaining this action.

I am consequently of opinion that the judgment of the Court of Queen's Bench should not be supported, and that judgment should be given for the plaintiff.

Kelly, C.B.

KELLY, C.B. I agree in opinion with Mr. Justice Brett, and chiefly upon the grounds upon which he has delivered that opinion.

It seems to me impossible to deny that inasmuch as, by the contracts between the parties, the defendants have agreed that an insurance has been effected, and as they now admit that a total loss has been sustained, the plaintiff is entitled to recover the amount of that loss. If there be no policy, and no insurance, for what can they pretend that they have received the different premiums and the contributions of the plaintiff to losses sustained by other members? This reduces the case to the single question whether the 39th and some other articles are a bar to the action on the ground that the decision of the directors is final and conclusive. If it be so, it can only be because the parties have contracted that there should be no remedy by action upon any claim upon any policy of insurance; and this would be not only to oust the Courts of their jurisdiction to entertain an action upon a policy of insurance, but, looking to the terms of the 39th article, would be to hold that no action at all is maintainable under any circumstances by a member against the company. For we find that the directors there "have full power" (inter alia) "to release any contract or agreement respecting any matter in which the society may be interested, and to decide all claims and demands upon the society by the members thereof; . . and all controversies and matters arising between the society and the members of the

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Kelly, C.B.

society concerning insurances or claims upon, or liabilities by or to the society; and the decision of the directors shall be final and conclusive; and no member of the society shall be allowed to bring any action, suit, or proceeding or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society or the members thereof except as therein provided." And no provision is to be found qualifying this part of the article. If this provision be of legal validity, the effect would be that, had the decision been in favour of the plaintiff, that he was entitled to recover the sum insured, he could have maintained no action to enforce it.

The case of *Scott* v. *Avery* (1) has been quoted, and undoubtedly there is much in the language of Lord Campbell in his judgment which, taken by itself, might seem to shew, as Baron Martin (2) (I think, incorrectly,) held, that it put an end to the doctrine against the ousting of the jurisdiction of the Courts.

But when we look to the facts of that case, and to the more cautious and, I think, accurate language of the Lord Chancellor, the decision may well be construed to amount to no more than that where the recovery upon a policy of insurance is made expressly dependent upon the amount of the loss having been ascertained by arbitration, or upon the performance of some other legal condition, and where other subjects of controversy are also to be submitted to arbitration, no action lies until the amount of the loss is so ascertained or the condition upon which the action may be brought has been performed. The language also of the judges, on which ever side their opinions were pronounced, is uniformly to the effect that the jurisdiction of the Courts cannot be ousted by the contract of the parties, though the maintaining of the action may be made conditional upon the amount of loss or damage being previously ascertained, or upon some other conditions not applicable to the present case.

I must add that the resistance of the defendants to this demand appears to me so extremely unconscientious and unjust that, speaking for myself, I should not hesitate to hold, under the leave reserved for that purpose, that, if it be held that the plaintiff cannot recover upon the policy, a count for money had and re-

(1) 5 H. L. C. 811. 2 Jur. N.S. 815

(2) In *Horton* v. *Sayer* (4 H. & N. at p. 650; 29 L. J. (Ex.) at p. 32).

5 Jur. N.S. 989

1876

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY.

Kelly, C.B.

ceived should be introduced, under which he may recover the amount of premium paid in respect of this policy, and possibly his contribution to the losses incurred by the society.

Here no question arose about the amount of the loss; nor was it ever required or proposed by the society, or the directors before whom the case was brought, that the amount should be referred; but they decided, at once and without raising or suggesting any other question, that there was no loss at all by the perils of the sea.

As to the point upon the Stamp Act, it is well disposed of by my Brother Blackburn; and, indeed, appears to have been abandoned.

Judgment reversed, and entered for the plaintiff.

Solicitors for plaintiff: *Paterson, Snow, & Burney.*
Solicitors for defendants: *Hayes, Twisden, Parker, & Co.*

LEGGOTT (ADMINISTRATRIX OF R. T. LEGGOTT) *v.* THE GREAT NORTHERN RAILWAY COMPANY.

May 23.

Executor and Administrator—Negligence causing Death of Intestate—Administratrix suing, first, under Lord Campbell's Act, and, secondly, for damage to personal Estate—Estoppel.

Claim, stating that plaintiff was administratrix of her husband, L., who, being a season-ticket holder, was received by the defendants, a railway company, at their station to be conveyed as a passenger, and by their negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expense, &c. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it. And, secondly, that after the death of L. the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the defendants in respect of the injury caused to them by his death, and recovered damages. Reply, that the defendants were estopped from denying the facts relating to the accident, as in the previous action they had pleaded, not guilty, and that L. was not received by them as a passenger, and those issues were found by the jury in the plaintiff's favour:—

Held, on demurrer, first, that the second action was not barred by the judgment and satisfaction under the first; secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action.

Bradshaw v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 C. P. 189), questioned.

CLAIM, stating that the plaintiff was the administratrix of R. T. Leggott, her husband, who died on the 3rd of August, 1874. That

1876

LEGGOTT v. GREAT NORTHERN RAILWAY CO.

the defendants were carriers of passengers between certain stations called King's Cross and Finchley, King's Cross station being occupied and managed by them. That the deceased had taken a season-ticket from the defendants entitling him to travel as a passenger on their line between the above-mentioned stations. That, on the 20th of March, 1874, the deceased was received by the defendants at their station at King's Cross as a passenger to be safely and securely conveyed by them from thence to Finchley in a train that was shortly expected to start. That, while lawfully waiting on the platform intended for passengers who wished to travel by that train, a barrow or trolley loaded with newspapers was by the negligence of the defendants violently pushed against him. That he was knocked down and seriously injured in the head and leg and otherwise. That in consequence of these injuries he was entirely unable to attend to his business from that day till the day of his death; incurred great expenses in providing other persons to manage his business, lost a large portion of the profits that he would otherwise have made, and the goodwill of the business, owing to his having been unable to attend to it, was rendered much less valuable. He also incurred large expenses in obtaining the necessary medical attendance, and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid. The plaintiff claimed 1000*l.* damages for injury to the personal estate and effects of R. T. Leggott.

Defence, 1. Denial that the deceased was received by defendants as a passenger upon the terms and for the purposes alleged in the statement of claim.

2. Denial that a barrow or trolley was by defendants' negligence violently or otherwise pushed against the deceased, or that by any negligence or default on their part the deceased was knocked down and injured, as alleged.

5. That after the death of R. T. Leggott, the plaintiff, as administratrix of his personal estate and effects for the benefit of herself, as the wife, and of the children of R. T. Leggott, sued the defendants in the Queen's Bench Division of the High Court of Justice, under the statute in such case made and provided, for that the defendants were in possession of a certain railway station called King's Cross and were carriers of passengers from

thence to Finchley, and the said Leggott in his lifetime, became and was received by the defendants as, a passenger to be by them as such carriers safely and securely carried upon such railway from the said King's Cross station to Finchley for reward to the defendants. Yet the defendants did not securely carry Leggott upon the railway on the journey, but so negligently and unskilfully conducted themselves in and about managing the station at King's Cross, and the platform, that after Leggott had been so received by them as a passenger, and while he was lawfully waiting upon the platform to be carried upon the journey, a barrow or trolley was, by the negligence of the defendants, violently pushed against him, and he was knocked down and injured in his head and leg and otherwise, and, by reason of the injuries thereby occasioned to him, within twelve calendar months next before the commencement of such action, died, and such proceedings were had upon such action that a verdict was taken by consent, and afterwards judgment was signed against the defendants for the cause of action for 500*l.* and costs, and the defendants paid to the plaintiff as administratrix 500*l.*, together with the amount of her costs in such action, and the plaintiff as such administratrix received the same in full satisfaction and discharge of the judgment and causes of action.

Reply, that the defendants ought not to be admitted to deny the facts in the first and second paragraphs denied, because it appears by the record in the action in the fifth paragraph mentioned that the defendants pleaded in answer to the declaration set out in the paragraph, first, that they were not guilty, and, secondly, that the said R. T. Leggott was not received by them to be carried as a passenger as alleged in the declaration, and that issue was joined on such pleas, and that at the trial such issues were found by the jury in the plaintiff's favour, and that judgment was signed thereon accordingly and such judgment still stands.

Demurrer to so much of the defence as is contained in the fifth paragraph, and joinder in demurrer.

The defendants also demurred to the reply, and the plaintiff joined in demurrer.

J. W. Mellor, Q.C. (*Harmsworth* with him), for the defend-

1876

LEGGOTT v. GREAT NORTHERN RAILWAY CO.

ants. (1) The reply is bad, for it appears from the record that the action referred to was an action under Lord Campbell's Act (2), and was brought by the plaintiff in another capacity. The plaintiff is in this dilemma. Either this is the same action as the one previously brought, or it is not the same cause of action, in which case there is no estoppel.

[QUAIN, J. If the issue is the same, and the parties are the same, the finding by the jury is conclusive whether the cause of action is the same or not.]

This was not an action between the same parties in the same rights or in respect of the same subject-matter of complaint: *Duchess of Kingston's Case.* (3) This being the case, there can be no estoppel. The administratrix sues in two different capacities, and must be regarded in each action as a different person.

[QUAIN, J. Is there any authority that, where a person is suing in one action as trustee for A. and in another as trustee for B., the estoppel does not apply?]

There is no express authority, but in *Doe* d. *Hornby* v. *Glenn* (4) it was held that an administrator could bring ejectment though he had, before taking out administration, arranged to surrender the premises to the defendant, on the ground that his agreement as administrator de son tort did not conclude him as lawful admi-

(1) The plaintiff's demurrer had been withdrawn in consequence of the defendants having amended their pleadings, but it was restored by consent during the argument; and the defendants therefore began.

(2) By Lord Campbell's Act (9 & 10 Vict. c. 93), s. 1, "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured."

By s. 2, "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

(3) 2 Sm. L. C., 5th ed. 656.

(4) 1 A. & E. 49.

nistrator. *Metters* v. *Brown* (1), where it was held that the plaintiff suing as administrator of his mother, was not concluded by a deed which he had executed in her lifetime, is a similar case. Secondly, supposing there is no estoppel, *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (2) is no authority to shew that an action like the present one may be brought after a recovery under Lord Campbell's Act. It is true, that that case decided that where a passenger on a railway died from injuries caused by the negligence of the railway company, his executrix might recover damages to his estate arising in his lifetime from the injury. But the case does not decide that two actions may be brought, one under Lord Campbell's Act and another for damages sustained in the lifetime of the deceased. There is also strong ground for contending that *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (2) was wrongly decided, for the case of *Potter* v. *Metropolitan District Ry. Co.* (3), upon which it proceeded, is distinguishable.

Bray, for the plaintiff. First, the defendants are concluded by the finding of the jury in the previous action. The plaintiff is suing in identically the same capacity as before. She brings this action as administratrix of the person deceased, and she brought the previous action under Lord Campbell's Act, as administratrix. In such an action it is unnecessary to state that the administratrix is suing for the benefit of the relations of the deceased. In each action the same person is plaintiff, and has the same opportunity of cross-examining.

[QUAIN, J. Could the plaintiff in the previous action have released it?]

Yes, unless there were evidence of default on her part. An estoppel, as appears from the notes to the *Duchess of Kingston's Case* (4), binds parties and privies to the previous proceedings. The reason why strangers are not bound is because the previous proceedings were res inter alios acta, which they were not at liberty to controvert: Buller's Nisi Prius, p. 233. This observation does not apply to the present plaintiff. The case of *Brad-*

(1) 1 H. & C. 686; 32 L. J. (Ex.) 138. *Ofm. 11 S. 616.*
(2) Law Rep. 10 C. P. 189.
(3) 30 L. T. (N.S.) 765.
(4) 2 Sm. L. C. 5th ed. 664.

1876

LEGGOTT v. GREAT NORTHERN RAILWAY CO.

shaw v. *Lancashire and Yorkshire Ry. Co.* (1) must be taken to have decided that two actions may be brought, an action under Lord Campbell's Act and an action for injuries in the lifetime of the deceased. If it were otherwise, and a judgment in one action were a bar to the other, the plaintiffs would have to run a race as to who should first obtain judgment.

MELLOR, J. I think this case is very well put by Mr. Bray, but we have come to the conclusion that it is a case in which an estoppel does not arise. It seems that though nominally the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family in respect of the death of the deceased, occasioned by the negligence of other persons, and the recital of the Act is that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him." It is therefore enacted that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof" (it is limited entirely to this), "then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." Then in the 2nd section it expressly enacts "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased." Then the jury are to assess damages proportioned to the injury. By the later statute, 27 & 28

(1) Law Rep. 10 C. P. 189.

Vict. c. 95, the machinery is altered. There it is recited that persons may lose the benefit of the Act, either from the expense of taking out probate or because of the neglect of the executor, therefore the action is given directly to the person injured, but it is exactly in respect of the same matter and the same cause limited by Lord Campbell's Act.

This being the state of things, the executor being the mere machine, and this being the form of machinery provided, by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's Act, and the question arises, can an admission on the record, made where the right of the executor to bring the action is expressly so limited, be set up in another action brought by the executor generally in respect of the assets and estates of the deceased, so that in that action the defendants who have submitted in the former action are to be precluded from denying the facts alleged in the second action? I think that there is no estoppel under those circumstances; although the machinery nominally is the same, the entire object and effect of the action is totally different, and any admission made by the executor, if it were on his side or her side, would not be available in a subsequent action which was brought in respect of the general assets of the deceased. It is to be observed that the executrix in a case under the Act, does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived. I think, therefore, the estoppel does not arise, and that the defendants were at liberty to traverse these allegations. With the single exception, so far as I am aware, of the case in the Common Pleas, *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1), there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action. But as that case has been decided on the very point, I entirely yield to the authority of the decision, so far as to say that in this Court it cannot be questioned, and we must therefore abide by it. I must say, however, that we yield to it for the purposes of this case, and that, at all events, if it is to be questioned, it must be questioned in a Court of Appeal.

(1) Law Rep. 10 C. P. 189.

1876

LEGGOTT v. GREAT NORTHERN RAILWAY CO.

QUAIN, J. I am of the same opinion. I think the defendants are entitled to judgment upon the demurrer to the estoppel. The rule about the estoppel is very correctly, I think, laid down in the note to the *Duchess of Kingston's Case.* (1) It is this: "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person in law." In other words it is generally put in the books that the plaintiff must not be only the same person, but he must be suing in the same right. I think that in these two actions before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether, and, therefore, that the estoppel does not arise. The present action which is now before us is an action by an administratrix in the ordinary sense of that word, representing the estate of the intestate and in point of fact bringing an action for a loss to that estate. It is the ordinary action brought by an administrator or executor, either to increase the estate generally, or for some loss that the estate has suffered in consequence of some acts within the statute, 4 Edw. 3, c. 7, which enables an executor to bring an action for damages to the personal estate. But when we come to look at the previous action it seems to be an entirely different kind of thing. Lord Campbell's Act enables an action to be brought in a case where it could not have been brought before that Act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's Act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The Act merely says that the nominal person to bring the action on behalf of certain relations (not on behalf of the next of kin or the creditors of the deceased, but on behalf of the beneficiaries, certain relations named in the Act of Parliament) shall be the executor or the administrator. It is plain, therefore, that an action brought by the person desig-

(1) 2 Sm. L. C. 7th ed. p. 792.

nated by the statute is brought in an entirely different right from that in which the action is brought by the executors generally as representing the estate of the testator or intestate. I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in the one does not constitute an estoppel in the other. I see that that very distinction is pointed out by my Brother Grove in his judgment in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1): "In the case of such right of action," that is to say, such as the present action, "he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act" (that is, Lord Campbell's Act) "he sues as trustee in respect of a different right altogether, on behalf of particular persons designated in the Act." It is true that in that case no question of estoppel arose, but my Brother Grove points out the very distinction we now take, and on which we decide this case, that these actions are not brought in the same right. Therefore the finding in the one is no estoppel in the other.

With regard to the action itself, I merely say, I yield to the decision in the Common Pleas, but without assenting to it.

Judgment accordingly.

Solicitors for plaintiff: *May, Sykes, & Batten.*
Solicitors for defendants: *Johnston, Farquhar, & Leech.*

(1) Law Rep. 10 C. P. at p. 192.

1876
May 6.

THE QUEEN ON THE PROSECUTION OF GRIFFIN, APPELLANT, *v.* THE HIGHWAY BOARD OF DRAYTON IN HALES, RESPONDENTS.

Highway Act (5 & 6 *Wm.* 4, *c.* 50), *ss.* 48, 105—*Sale of Land allotted to Parish for Building Materials—Adjoining Owner's Right of Pre-emption—Price, how to be fixed—Right of Appeal.*

By the Highway Act, 5 & 6 Wm. 4, c. 50, s. 48, after reciting that under inclosure Acts land has been or may be allotted to parishes or the surveyors of highways, for the purpose of obtaining materials for the repair of the highways in the parish, and the materials on such land have been or may be exhausted, it is enacted "that it shall be lawful for the surveyor of the parish, with the consent of the vestry, and with the consent in writing of the justices at a special sessions, to sell the land to some person whose lands adjoin thereto, or if he refuse to purchase, to any other person, for such price as the justices may deem fair and reasonable." By s. 105, any person who shall think himself aggrieved by any sale made under or in pursuance of the Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of the Act, may appeal to the quarter sessions.

The appellant was the owner of land adjoining an exhausted gravel pit, the soil of which had been previously allotted to the surveyor of highways under s. 48. The highway board, in whom were vested the powers of surveyor of highways, applied to justices at a special sessions to fix the price at which the pit should be sold. The justices by order consented to the sale of the pit, and fixed the price at 450*l.*, which, owing to special circumstances, a gentleman in the parish was willing to give for it. It appeared that 135*l.* 6*s.* 6*d.* was a fair and reasonable price as between the highway board and the appellant, and the 450*l.* a reasonable price having regard to the interests of the parish only:—

Held, first, that under s. 105 there was an appeal against the order to the quarter sessions; secondly, that the justices were bound to fix the price of the pit fairly as between the adjoining owner and the parish, and not with regard to the interests of the parish exclusively; and that the smaller sum was the proper price.

UPON appeal to the Staffordshire quarter sessions against an order of justices made at a special sessions for highways, authorizing the sale of an exhausted gravel pit at a price thereby fixed by the justices under s. 48 of the Highway Act, 5 & 6 Wm. 4, c. 50 (1), the sessions quashed the order subject to the following case for the opinion of the Court:—

(1) By the Highway Act, 5 & 6 Wm. 4, c. 50, s. 48, after reciting that under inclosure Acts land has been or may be allotted to parishes or the surveyor of highways, for the purpose of obtaining materials for the repair of the highways in the parish, and the materials in such land have been or may be exhausted, it is enacted "that it shall be lawful for the surveyor of the parish,

1. By an inclosure award, made in the year 1773, under an Act of the 13th year of Geo. 2, two gravel pits, one of which is the gravel pit referred to in the order of justices, were allotted to the highway surveyor for the time being of the Staffordshire part of the parish of Drayton in Hales, for the repairs of the highways within that part of the parish.

2. This gravel pit became exhausted many years ago.

3. The highway board for the district of Drayton in Hales have, under s. 43 of 25 & 26 Vict. c. 61, become the successors of the surveyors of the highways for the said parish.

4. The appellant is the owner of a house and grounds abutting on the site of this exhausted pit and is the only person whose lands adjoin thereto.

5. Owing to the fact that this site adjoins his house and garden and to the annoyance which might be caused to him by any other person into whose hands the land might fall, it has a special accommodation value to him far beyond the intrinsic value of the land.

6. At a meeting of the highway board, held in the month of May, 1873, it was resolved that a land surveyor should be instructed to report on the condition and value of this gravel pit.

7. The surveyor reported to the board that the gravel pit was exhausted, and he valued it at 155*l.* 6*s.* 6*d.*

8. In due course the waywardens were authorized to apply to the justices in special sessions to fix a reasonable price for the gravel pit in question and to give their consent to its sale.

9. On the 26th of October, 1874, at a special sessions held at Newcastle-under-Lyme, application was made to the justices there assembled in accordance with the resolution just mentioned.

10. The justices thereupon made the order appealed against, whereby they consented to the sale of the gravel pit and fixed the price at 450*l.*, which sum, under special circumstances which do not affect the points to be submitted to the Court, a gentleman who is an owner of property in the parish, but who has no land

---

with the consent of the vestry, and with the consent in writing of the justices at a special sessions for the highways, to sell the land to some person whose lands adjoin thereto, or if he refuse to purchase, to any other person, for such price as the justices may deem fair and reasonable."

1876

THE QUEEN v. DRAYTON HIGHWAY BOARD.

adjoining or abutting upon the exhausted gravel pit, was willing to give.

11. The appellant gave notice of appeal to the quarter sessions, and it is admitted that he complied with all necessary formalities, provided any right of appeal existed.

12. The quarter sessions found as a fact that the sum of 450*l.* was not a fair and reasonable price as between the parish or highway board and the appellant, but that such fair and reasonable price was 155*l.* 6*s.* 6*d.* But that, looking at the interest of the parish only, the sum of 450*l.* was a fair and reasonable price for the highway board to obtain for their interest in the site of the gravel pit.

The questions for the opinion of the Court are:—1. Had the appellant a right of appeal to the quarter sessions against the order of justices? 2. Was it the duty of the justices in special sessions to regard the interests of the adjoining proprietor, and to fix a fair and reasonable price as between vendor and purchaser in relation to ordinary market value, of the site of the exhausted gravel pit, or was it their duty to regard the interest of the parish or highway board only, and to fix a price higher than the ordinary market value, but which could be obtained under special circumstances from a purchaser other than an adjoining proprietor?

Holl (*Bosanquet* with him), for the appellant. The question turns upon the construction of s. 48 of the Highway Act. The intention of the legislature was that the justices should fix what was a reasonable price as between the parish and the adjoining owner. If a different construction be adopted, the right of pre-emption will be valueless. As to the right of appeal, it is clearly given by s. 105. (1)

[BLACKBURN, J. The proceeding by the justices certainly does look like a determination by them in respect of which no relief is given.]

(1) By 5 & 6 Wm. 4, c. 50, s. 105, "If any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person, in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions, ..."

Lawrance, for the respondents. First, there was no appeal to the quarter sessions under s. 105 against this order made under s. 48. The justices do not determine the price, but simply give their sanction to a price submitted to them.

[BLACKBURN, J. It is such price as the justices deem fair and reasonable.]

It is first necessary for the vestry to come to a conclusion that they will sell at all.

[BLACKBURN, J. The appellant had a right to have the land offered to him at a price fixed by the justices. Was not that a matter in which he has an interest, and therefore a right to appeal?]

Then, as to whether this is a fair and reasonable price, there is nothing to shew that the justices are to fix or determine the price. The intention was that the sale was to be for the benefit of the parish, and not of the adjoining owner.

[BLACKBURN, J. The pre-emption clauses in all these Acts go to shew that the legislature had in view the convenience of the adjoining owners.]

The true test of the value of this land is that you have got a person, whose land is not adjoining, who is willing to give so much, and the board would be wanting in their duty if they did not secure the best price.

BLACKBURN, J. I think that in this case the decision of the quarter sessions was right. Two questions have been raised before us; one, whether there is an appeal. The other is a more important question, whether the principle laid down by the quarter sessions in fixing the price of the land was right. This depends on the construction of s. 48 of the Highway Act. [The learned judge read the section.] The vestry are to authorize the sale. Then there is a clause providing for the consent of the justices. Now, what are the justices to do? The justices are to fix the price at which the land is to be sold, but it is to be "fair and reasonable." I do not think that, by fixing that fair and reasonable price, is meant that they are to fix the highest price that can be got. I do not think, in fixing the price at which the land is to be offered to the person whose land is adjoining, they are to take

1876

THE QUEEN v. DRAYTON HIGHWAY BOARD.

solely into consideration what would be given by a person with some personal motive for wishing to possess the land. I think the right of pre-emption would be illusory unless some tribunal is to fix the price with regard to the interests of the adjoining owner as well as of the parish. The justices have fixed the price at 450*l.* There is an appeal against this assessment, which, I must say, I think comes exactly within the appeal clause (s. 105). Then the quarter sessions, who entertain the appeal, say this: "The justices below fixed the price at 450*l.*, which, under special circumstances, a gentleman was willing to give." If this ground had been offered for sale by auction, there was a person who would have given 450*l.* Doubtless 450*l.* would be the price the justices would fix if they only thought of what could be got. But if they have to consider the interests of an adjoining owner, they must take into account not simply what would be given by anybody else, but what would be a fair price for him to pay. Unless that were so, the right of pre-emption would be illusory. I think the quarter sessions rightly understood the Act.

QUAIN, J. I am of the same opinion. The question depends on the construction of s. 48 of the Highway Act. I think it certainly was intended to confer some benefit on the adjoining owner. And as soon as the vestry have consented to sell, the justices are, as it were, arbitrators between the vestry on the one side and the adjoining owner on the other, as to what is the fair price. The quarter sessions, in fixing a price, have taken into consideration the interests of the adjoining owner as well as of the parish. I think that is the proper price at which this property ought to be sold, and not some fancy price which a particular person, not an adjoining owner, would give.

Order of sessions affirmed.

Solicitors for appellant: *Morley & Shirreff.*
Solicitor for respondents: *A. R. Oldman.*

METCALFE *v.* THE BRITANNIA IRONWORKS COMPANY.

1876
July 1.

Charterparty—Right to Freight where Voyage incomplete—Freight pro ratâ.

A cargo of railway bars was shipped under a charterparty from a port in England to Taganrog in the Sea of Azof, "or so near thereto as the ship could safely get;" freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship on the 17th of December at Kertch, a port about thirty miles from Taganrog, which was as near as he could then get, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they, on the 27th of December, delivered it to the agent of the railway company, on his producing written authority from the company together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight had been paid. The agent of the company gave a written acknowledgment that he had received the cargo "on the power of the charterparty and bill of lading passed to me by the railway company." The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—

Held, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery, so near to Taganrog as the ship could safely get, within the charterparty; secondly, by Mellor and Quain, JJ., that the plaintiff was entitled to no freight; Cockburn, C.J., being of opinion that he was entitled to freight pro ratâ.

CASE stated without pleadings.

The action was brought to recover 1491*l.* 16*s.* 3*d.*, being 1080*l.* for freight on 900 tons of iron per steamship *Meredith*, at 24*s.* per ton, as per charterparty of the 7th of October, 1873, and 441*l.* 16*s.* 3*d.* for freight on 299½ tons of iron per the same vessel, at 27*s.* 6*d.* per ton, as per charterparty of the 3rd of November, 1873, and interest thereon.

1. By a charterparty dated the 7th of October, 1873, and made between the plaintiff (therein described as the chartered owner of the steamship *Meredith*, of the burthen of $\frac{260}{753}$ tons register measurement, or thereabouts, then bound to London or Dunkirk from the Black Sea) and the defendants, it was agreed that the ship should, with all convenient speed, proceed to Middlesborough-on-Tees, and there load from the agents of the defendants a part of a cargo (say, 900 to 1000 tons) of railway iron, and being so

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

loaded, should therewith proceed to Taganrog, or so near thereunto as she might safely get and deliver the same afloat, on being paid freight at the rate of 24*s.* per ton of 20 cwt., delivered, in full of all port charges, pilotages, &c. (the act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, river, and steam navigation, of whatever nature and kind soever during the said voyage, always excepted). The freight to be paid as follows: one third to be advanced on signing bill of lading, if required, less 3 per cent. to cover all charges, and the balance in cash in London, against certificate of right delivery of the cargo.

2. By the charterparty it was, amongst other things, agreed that the ship should have liberty to call at Havre to complete cargo for ports on the way, it being understood that she should not remain in Havre more than seventy-two hours.

3. The ship, after the date of the charterparty, arrived at Dunkirk, and there met with an accident, which necessitated her being repaired, for which purpose she went to Sunderland, and this delayed her arrival at Middlesborough for some time.

4. By a second charterparty, dated the 3rd of November, 1873, and made between the same parties, it was agreed that the *Meredith* should, with all convenient speed, proceed to Middlesborough-on-Tees after repairs, and there load, from the agents of the defendants, about 800 tons of railway iron, in addition to 900 tons as per charterparty of the 7th of October, and being so loaded, should therewith proceed to Taganrog, or so near thereunto as she might safely get, and deliver the same afloat, on being paid freight at the rate of 27*s.* 6*d.* per ton of 20 cwt. in the same manner as by the first charter.

5. and 6. Both charterparties contain the following provisions:—

"Ship to have an absolute lien for all freight, dead freight, and demurrage.

"To address to charterer's agents, Messrs. Berthold, Smith, & Co., Taganrog, paying 2 per cent. commission.

"Captain to telegraph from Constantinople and Kertch his departure and weight of cargo to the agent of the Rostoff and Wladikowkese Railway Company, Taganrog, or in default he will have no claim for demurrage."

7. The *Meredith*, so soon as she was repaired, proceeded to Middlesborough-on-Tees, and there loaded from the agents of the defendants 900 tons of railway iron under the first charterparty, and 299½ tons of railway iron under the second charterparty.

8. The freights payable under the two charterparties respectively are the sums sought to be recovered as above stated.

9. The *Meredith*, so soon as she was so loaded, proceeded on her voyage to Taganrog, and arrived at Kertch on the 17th of December, 1873.

10. Upon arriving at Kertch the captain of the *Meredith* found —and it was the fact—that the Sea of Azof was then closed by ice; that the navigation of the port of Taganrog was effectually closed, and all the buoys, light-ship, and other marks for navigation had been removed for the winter.

11. The captain thereupon proposed to discharge his cargo at Kertch, and made a protest at that place, of which the following are the material parts:—

Protest, Steamer *Meredith*.

Arrived in Kertch on the 17th of December, 1873, with a cargo of railway iron (bars) consigned to the Rostoff and Wladikowkese Railway Company, I found that the sea of Azof was closed by ice, and that the navigation of the port of Taganrog, where the ship had to deliver the cargo, was officially and to all purposes closed, and all the buoys, light-ship, and other marks for the navigation of its intricate gulf were removed for the winter. Basing myself upon the charterparty, and pointedly to that part of it beginning with "Taganrog, or so near thereunto as she may safely get," and next to the part of it beginning with "the act of God," and ending with "all and every other accident, dangers of the sea, rivers, and steam navigation of whatsoever nature and kind soever during the said voyage always excepted," I determined to discharge the cargo at Kertch as the nearest port to Taganrog, to which the steamer could safely approach, all others being closed by ice, having given proper notice of such determination to the consignees of the steamer at Taganrog, Messrs. Berthold, Smith, & Co., by telegram, dated from Kertch the 18th of December.

Acting on the aforesaid, I am discharging my cargo at this port of Kertch under protest, and at the expense and risk of the consignees, or whom it may concern, as no documents for the reception of the same have been presented. Consequently I hereby solemnly protest against such receivers of said cargo, holding them responsible for all detention, loss of time, extra expenses, fines of Custom House for late presentation of documents, and whatsoever other charges to which I may be exposed.

20th December, 1873.

12. On the 19th of December, 1873, Messrs. Berthold, Smith,

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

& Co., on behalf of the defendants, sent the following telegram, which was received by the captain before he had commenced the discharge of the cargo :—"If you discharge your steamer will be held responsible all consequences infraction charterparty."

13. Kertch was, under the circumstances, as near to Taganrog as the *Meredith* could get (1), so long as the sea of Azof was closed by ice, which, according to the ordinary course of weather, would have been until the latter end of the month of April, 1874.

14. As no bill of lading for the cargo was produced to the captain of the *Meredith* at Kertch, he, in order to protect the ship, landed the cargo at Kertch, and gave it into the custody of the custom-house authorities there.

15. By the bills of lading, signed by the captain, the cargo was made deliverable at the port of Taganrog, "all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted, unto the Rostoff and Wladikowkese Railway Company, freight and other conditions as per charterparty.

"Captain to apply to Messrs. Berthold, Smith, & Co., Taganrog."

16. After a part of the cargo had been landed, one Jean Deopik, a merchant at Kertch, claimed the cargo under a power of attorney from the Rostoff and Wladikowkese Railway Company.

17. When the whole cargo had been delivered to the custom-house authorities at Kertch, Jean Deopik produced to them copies of the charterparties and bill of lading for the cargo and his power of attorney, and thereupon the cargo was delivered to him by the custom-house authorities, without payment of any freight, and notwithstanding the captain's claim to retain the cargo on behalf of the owner of the *Meredith* until the freight was paid; and Jean Deopik thereupon gave to the captain the following receipt for the cargo:—"On the power of the charterparty and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the S.S. *Meredith*, composed of six thousand five hundred and seventy-eight (6578) bars of railway

(1) On the argument it was agreed that the port of Kertch was about thirty miles from Taganrog.

iron. This receipt to be the only one given, and all others to have no value.

"Kertch, 15/27 December, 1873. "Jean Deopik."

The *Meredith* sailed from Kertch on the 29th of December, 1873.

19. The cargo was in due course received by the said company; but the freight for the same has not been paid pursuant to the said charterparties or either of them.

The Court is to have power to draw inferences of fact.

The question for the opinion of the Court is, whether under the above circumstances the plaintiff is to be entitled to be paid the chartered freight, or any and what amount for the carriage of the railway iron by the *Meredith* to Kertch.

Nov. 9, 12. *Cohen, Q.C.* (*Beresford* with him), for the plaintiff.

W. Williams, Q.C. (*Hollams* with him), for the defendants.

The nature of the arguments sufficiently appears from the judgments of the Court. All the authorities cited are noticed in the judgments.

Cur. adv. vult.

July 11. COCKBURN, C.J. This is an action brought to recover a sum due for freight for the conveyance of a cargo of iron bars, shipped under two charterparties on board the plaintiff's vessel, the *Meredith*, to be carried from Middlesborough-on-Tees to Taganrog on the sea of Azof, "or so near thereto as the ship could safely get." The defendants were the charterers of the vessel. By the bills of lading, signed by the master, as well as by the charterparties, the iron was to be delivered at the port of Taganrog. It was consigned to the Rostoff and Wladikowkese Railway Company, at the latter place. Cockburn, C.J.

The cargo having been taken on board, the ship started without delay on the voyage as agreed on; and arrived on the 17th of December at Kertch, a port distant from Taganrog about thirty miles. On arriving at Kertch, the master learned that the Sea of Azof was blocked up with ice, and the navigation suspended, the effect of which was that the further conveyance of the cargo to its destination was rendered impracticable till the ensuing spring, the

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

navigation being usually closed till the end of April. Relying on the terms of the charterparty, which, as has been stated, provided that the ship should proceed to Taganrog, "or so near thereto as she could safely get," the master, finding that he could get no nearer to Taganrog than Kertch, conceived that he was entitled to land the cargo at the latter place, and proceeded accordingly to discharge and land it. In so doing, he acted in direct defiance of the opposition of the agents of the charterers at Taganrog, to whom he had notified what he was about to do, and who, having thus become aware of it, gave him express notice not to land the cargo at Kertch, and that if he did so he would be held liable under the charterparty. There being no one to receive the cargo, the master placed it under the charge of the custom-house authorities. From the latter it was claimed by an agent of the Rostoff and Wladikowkese Railway Company, the consignees, and on the production of the charterparties and bills of lading possession was delivered to their agent by the authorities, notwithstanding a claim by the master that it should be retained till his freight was paid. Upon taking possession, the agent of the consignees, who must be presumed to have had full authority for the purpose, delivered to the master, no doubt by the direction of the authorities, a receipt in these terms:—

"On the power of the charterparty and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the S.S. *Meredith*, composed of six thousand five hundred and seventy-eight (6578) bars of railway iron. This receipt to be the only one given, and all others to have no value.

"Kertch, 15/27 December, 1873."

Upon these facts I entirely concur in thinking that the plaintiff is not entitled to recover the full freight. The case of *Schilizzi* v. *Derry* (1) established that when a charterparty speaks of a vessel, bound to a particular port, discharging "as near as she can get" to such port, this must be taken to mean some place "within the ambit" of the port; and Kertch certainly cannot be said to be within the ambit of the port of Taganrog.

I also concur in thinking that the receipt given by the agent of

(1) 4 E. & B. 873; 24 L. J. (Q.B.) 193.

the consignees does not amount to an admission of the "right delivery" of the cargo. It amounts to no more than an admission of the delivery of the cargo at Kertch, which is not a "right delivery" of it so as to entitle the owner to the full freight.

But it appears to me that the acceptance of the cargo by the consignees, and the receipt thus given by their authorized agent, are very material facts in determining the further question with which we have to deal, namely, whether the plaintiff, the shipowner, is here entitled to freight pro ratâ itineris.

I agree that, according to the terms of an ordinary charterparty, or bill of lading, the whole voyage for which the freight is agreed to be paid must be accomplished before any freight becomes payable. And I agree that the master cannot, by wrongfully stopping short of the place of destination, compel the owner of the goods to take them, and pay the freight even for the part of the voyage performed, any more than the charterer, on the other hand, can insist on having the cargo delivered at an intermediate place, so as to deprive the shipowner of the opportunity of earning his full freight. If he desires to have his goods short of their original destination, unless some arrangement is come to between them, he must satisfy the shipowner for the entire freight as fixed by the charterparty.

But, it is obvious, that, while such is the absolute right of each of the parties to the charter, this right may be varied or waived; and that, while the shipowner may be willing to forego his right to earn the entire freight, on being paid a rateable part for so much of the voyage as has been performed, the goods-owner, on the other hand, may be willing to take the goods at an intermediate place, and to waive the conveyance of the goods to their original destination, paying a proportionate part only of the freight, all claim to the residue being abandoned. And such an arrangement, in substitution of the original contract, may not only be express, but may also be implied from the circumstances and the conduct of the parties; as was done in the case of *The Soblomsten* (1); and ought to be so implied where justice and equity require it.

Where such an express arrangement has been come to, of course no difficulty exists. The case, in which the question whether such

(1) Law Rep. 1 A. & E. 293.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

an arrangement is to be implied usually arises, is where the ship becomes disabled by some vis major, and it becomes necessary to land the cargo at an intermediate port, where there are no means of sending it on, and it is there taken possession of by the owner, or sold by the master for the benefit of those concerned. Nothing could apparently be more unjust than that, having had the benefit of the conveyance of the cargo so far on its way, the owner, if he has derived benefit from its conveyance so far, should be released from the obligation of paying a proportionate part of the freight. No doubt, under such circumstances, it becomes necessary for the master, if he desires to earn the freight, either to repair his ship, or to procure another in which to send on the cargo. But it may be that the ship cannot be repaired, and that no other ship can be procured, or not without such a delay as would be fatal to the goods, or to the adventure. Under these circumstances the owner of the goods is not bound to take to them if unwilling to do so. If they are not worth paying the freight upon, he may refuse to accept them; but if he accept and dispose of them, ought we not to imply an undertaking on his part to pay for the conveyance of them so far as it has gone?

1 Q.B.D. 430

Such was the view taken by Lord Mansfield and the Court of King's Bench, in conformity with the rule laid down by the old authorities on maritime commercial law, in the well known case of *Luke* v. *Lyde*. (1) There a cargo of salt fish having been shipped on account of the defendant, a merchant in England, on board the plaintiffs' ship, to be conveyed from Newfoundland to Lisbon, the ship, when within a few days' sail of Lisbon, had been taken by a French privateer, but had afterwards been recaptured and brought to England; whereupon the defendant claimed and obtained possession of the cargo. An action of assumpsit having been brought by the owners of the ship to recover freight pro ratâ, Lord Mansfield, in an elaborate judgment, after referring to the old authorities on maritime law, decided in favour of the plaintiffs,—not upon any fiction of a substituted contract, or of a dispensation of part of the voyage originally agreed on, but on the broad principle of maritime law, that, the voyage having been

(1) 2 Burr. 882; 1 W. Bl. 190, S. C. nom. *Luke* v. *Lloyd*.

interrupted without any fault of the shipowner, the merchant, who has had the benefit of partial conveyance, if he takes the goods, must pay freight pro ratâ.

In so holding, the Court of King's Bench appears to me, I must say, to have decided according to justice and good sense.

In the subsequent case of *Baillie* v. *Mogdigliani* (1) a ship bound from Nevis to Bristol had been taken by a French ship and condemned in a French prize court; but the sentence of condemnation was afterwards reversed, and restitution ordered. In the meantime, however, the ship and cargo had been sold. The merchants received the proceeds and paid freight to the master pro ratâ itineris; and the goods having been insured, they brought an action against the insurers to recover the amount of freight so paid. It was held that they could not recover; but Lord Mansfield said: "As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total where part of the property is saved, and the owner takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods; and, therefore, freight was certainly due pro ratâ itineris."

The subsequent case of *Cook* v. *Jennings* (2) might at first sight appear to conflict with the foregoing authorities, inasmuch as, the ship having been wrecked on the voyage, but the goods having been saved, the merchant, who had taken possession of them, refused to pay freight, and the action having been brought to recover it pro ratâ, it was held that the action would not lie. But the decision turned on the form of action. The plaintiff having sued on the charterparty, which was under seal, had declared in covenant; and as on reference to the charterparty it appeared that the freight was payable on the right delivery of the cargo at the port of destination, it was held that until this condition had been complied with no freight became payable under the charter; and that the contract being under seal, no implied assumpsit could be raised. Lawrence, J., puts the case on the right ground: "I agree," he says, "with the plaintiff's counsel, that whether the contract be by parol or under seal, the operation

(1) Park on Insurance, ch. ii. 8th ed. p. 116. (2) 7 T. R. 381.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

of the law on it is equally the same. When a ship is driven on shore it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight; but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owners of the goods prevent him; nor is he entitled pro ratâ unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action."

The case of *Hunter* v. *Prinsep* (1) is also an authority which, at first sight, may appear to conflict with that of *Luke* v. *Lyde*. (2) A vessel, bound from Honduras to London, having been captured and recaptured, and taken by the recaptors into St. Kitts, was there wrecked, but the cargo was saved. The master, acting bonâ fide for the advantage of all concerned, but without orders or authority from the owner of the cargo, and apparently without any necessity arising from inability to forward the goods, having obtained an order from the Vice-Admiralty Court of the island, which order that Court had no power to make, sold the cargo. The plaintiff, the owner of the cargo, having brought an action for money had and received against the shipowner to recover the amount of the proceeds, the defendants sought to set off the amount of freight pro ratâ. But Lord Ellenborough, delivering the judgment of the Court of King's Bench, held that, inasmuch as by the terms of the charterparty, which was under seal, the freight was to be paid in particular modes and proportions, "on a right and true delivery of the cargo," no freight had become payable under the charterparty; and that, as the sale of the goods by the master, which had been made without the assent of the plaintiff, and without necessity, was unlawful, and the conveyance of the goods to their destination had thus been rendered impossible by the tortious act of the master, the plaintiff, the

(1) 10 East, 378. (2) 2 Burr. 882.

freighter, could not be taken to have dispensed with the further conveyance of the goods according to the terms of the original contract.

It was more difficult to deal with the argument urged on behalf of the defendants, that, by bringing an action to recover the proceeds of the sale, the plaintiff would receive the equivalent of the goods, and therefore, virtually the goods themselves, and consequently became liable for the pro ratâ freight, as much as if he had received possession of the goods themselves on the spot. Nor, in my opinion, was any satisfactory answer given. It was not enough, as it seems to me, to say that the sale was tortious on the part of the master. By waiving the tort, and suing in assumpsit for the proceeds of the sale, the plaintiff became liable,—certainly in point of justice, and, as it seems to me, in law,—to the claim of the defendants for partial freight by way of set off, just as much as if he had taken to the goods themselves and sold them where they were.

Lord Ellenborough, it is true, puts the matter on such a footing as would render it impossible ever to imply a dispensation by a freighter of performance of part of a voyage. "The general property in the goods," he says, "is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight"—by which the Chief Justice evidently means the entire freight—"or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession." (1) It is to be observed, however, that Lord Ellenborough does not seem to have had present to his mind the possibility of a case in which partial freight could be earned. In the case before him the ship had been taken out of her course as the result of her capture, and had been taken into St. Kitts by the recaptors. It is difficult to see how any freight could have been earned. The case of *Luke* v. *Lyde* (2) does not seem to have been dealt with by the Court.

In the later case of *Vlierboom* v. *Chapman* (3), however, the question of pro ratâ freight presented itself as the point for decision, and a similar judgment was given under still more striking

(1) 10 East, at p. 394. (2) 2 Burr. 882.
(3) 13 M. & W. 230.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

circumstances. A cargo of rice having been shipped at Batavia, to be delivered at Rotterdam, and the ship having been compelled by a hurricane to put into the Mauritius, the rice was found to have been damaged, and to be in a state of rapid putrefaction, and it was, therefore, as a matter of necessity, sold by the master, of course without the knowledge of the owner, whom at that distance it was, under the circumstances, impossible to consult. An action having been brought against the shipowner by the freighters to recover the proceeds of the sale, the defendant, though the action was in assumpsit, was held not to be entitled to set off the freight pro ratâ. I confess myself wholly unable to follow the reasoning of the Court. It seems to have been admitted that, as the goods must otherwise have perished, the master had authority, as agent of the shippers, to sell. Nevertheless, it was held that his thus dealing with the goods as agent for the freighters, although it might amount to an acceptance of the cargo by the latter, did not operate on their part as a dispensation of the conveyance of the goods to their destination, because, as the shipowner was not in a condition to carry it, it could not be supposed that the freighters would dispense with the performance.

Here, again, no notice is taken of the case of *Luke* v. *Lyde* (1), in which, as I have before said, Lord Mansfield and the Court of King's Bench put the right to recover freight pro ratâ, not on any dispensation by the freighters, or new contract in substitution for the charterparty or bill of lading, but on the principle of maritime commercial law, that the merchant, if he takes the goods short of their destination, when the shipowner, without any default on his part, but through the operation of a vis major, is prevented from carrying them on, is bound, having had the benefit of their carriage so far, to pay freight pro ratâ.

The argument of Lord Ellenborough that, where the shipowner is unable to forward the cargo, and so to earn the freight, the right of the shipper to the possession of it at once arises without any corresponding right in the shipowner to freight pro ratâ, may hold where the circumstances give the master no authority to dispose of the goods. But it obviously becomes a very different thing where, the ship having become disabled, and the goods

(1) 2 Burr. 882.

damaged, the duty is cast upon the master to dispose of the cargo in the interest of the owner of it.

The legal position of the master of a vessel, disabled from carrying on the cargo, at an intermediate port may be stated thus: If he desires to earn the entire freight he must cause the ship to be repaired, or send on the cargo in another vessel. But if he chooses to forego the freight, he is not bound to do either. The ship may be not worth repairing; the expense of hiring another ship may be greater than the freight to be earned. Having done his best to protect the goods, he may leave them to be dealt with by the owners, the only consequence being that he forfeits the freight. But it may be that the master has no option; that the ship is incapable of being repaired, and that no other can be procured, while the circumstances are such as to render it certain that it will not be worth the while of the owner of the goods, either owing to the locality or the distance at which they are found, or owing to their damaged condition, to send out a ship to bring them on; or it may be that the goods are perishable, and would become worthless by any delay. Under such circumstances, if the goods-owner cannot be communicated with, and his instructions taken, within such time as the master can reasonably be expected to wait, the latter, as the servant and representative of the ship-owner, has cast upon him the duty of acting for the goods-owner and disposing of the cargo to the best advantage. This obligation is tacitly implied in the charterparty or bill of lading, and, like every obligation to do a thing, involves an authority from the party to whose benefit the obligation enures to do the thing which is the subject-matter of the obligation. Where, therefore, the master, in disposing of the cargo, acts bonâ fide and with reasonable judgment and discretion, the goods-owner will be bound.

The law, as thus laid down by Lord Stowell in the case of *The Gratitudine* (1), has since been universally acquiesced in. This being so, the position of Lord Ellenborough that, where the goods are not about to be carried on, possession may be demanded by the freighter, and if the demand be not yielded to, will be wrongfully withheld, appears inapplicable to the case of a master so circumstanced; and that of Parke, B., that the shipowner, not

(1) 3 Rob. Adm. 240.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

being able to carry or send on the goods, it cannot be supposed that the shipper would waive the further conveyance of them, seems equally so, where the master is acting as the agent of both parties, and doing that which is most conducive to their common advantage. If the master, under these circumstances, becomes, to use the words of Willes, J., in *Notara* v. *Henderson* (1), the "agent of necessity" of the shipper, he becomes so as the servant of the shipowner, and by virtue of the original contract, which therefore must be taken to be still subsisting, though the goods cannot be carried on. If the law thus casts on him the duty of acting as agent for the shipper, it does not take from him the character of agent for the shipowner, or the duty of looking to the interest of the latter as well as to that of the former. If he becomes clothed with the character of agent for the goods-owner, he acquires authority to do what the latter, if on the spot, might do, namely, dispense with the further transport of the goods.

It is, moreover, clear that cases may occur in which it would be for the manifest advantage of the freighter that the goods should be sold, and the freight deducted: as, for instance, where the goods, being at an intermediate port, are found to have become so damaged that, if carried on to their destination, they will be worthless when they reach it, as was the case in *Notara* v. *Henderson*. (2) That case is an express authority for saying, that the master may not carry on a damaged cargo, for the purpose of earning the freight, where the necessary effect will be the destruction or deterioration of the goods. In such case, at all events where the damage cannot be arrested at a reasonable expense of time or money, it becomes the duty of the master to sell; but it is obviously only equitable that if the master, as the agent of the shipowner, is prevented, in the interest of the shipper, from earning the entire freight at the expense of the cargo, the shipper, in consideration of the benefit he thus secures, shall at least pay the freight for so much of the voyage as shall have been performed.

The cases on which I have been commenting, if in point, are of course binding on us, and can only be reviewed, as I hope they will be if the occasion should arise, in a Court of Appeal. But

(1) Law Rep. 7 Q. B. at p. 230.
(2) Law Rep. 5 Q. B. 346; 7 Q. B. 225.

they do not go the length of overruling *Luke* v. *Lyde*. (1) All they do is to establish that where the master takes upon himself to sell the cargo without express authority from the shipper, though he may be perfectly justified in so doing, as the agent of the latter, by the circumstances in which he is placed, the shipowner cannot recover the pro ratâ freight. They do not touch the case in which the goods come to the hands of the owner short of their destination, and the owner has derived benefit from their conveyance so far, which is what has occurred in the case before us.

In deciding a question of English law, foreign law is, of course, of no authority. Nevertheless, as in a matter of commercial law it is of importance that the rules of commercial nations shall, as far as possible, be the same, it may not be unimportant to see what is the state of the Continental law on this subject. The law will be found in the French Code de Commerce, Article 296; in the Italian Codice di Commercio, at Article 403; in the Spanish Code, Articles 777 and 778; in the Code of the Netherlands, Article 478; in the Prussian Code, Articles 1701–6; in the Russian Code, Article 747; in the German Code, Articles 632–3. The rule in all these is the same, namely, that the master of a disabled ship is bound, if his ship cannot be repaired, to procure, if possible, another to carry on the goods. If both are impossible, he may then abandon the goods to the owners, and will be entitled to his freight pro ratâ, or, as it is termed in the German law, the distance freight. The German law has, however, this qualification, that the freight payable shall not exceed the value of the goods.

In the present instance, the charterers having had the cargo brought from the Tees to within thirty miles of Taganrog, nothing could be more unjust than that the shipowner should receive nothing for the conveyance of it so far. And the principle of the decision in *Luke* v. *Lyde* (1) appears to me distinctly applicable.

But besides this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it may properly be inferred.

Being prevented by the state of the navigation from taking

(1) 2 Burr. 882.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

the cargo on to its destination, the master was justified in landing and warehousing it at Kertch, provided he thereby put the charterers to no extra expense. He was not bound to wait with his ship, with the iron on board, till the navigation should be open—a period of four months. All that could be required of him would be that he should bring on or forward the cargo as soon as the navigation should be again open. In the meantime he was at liberty to seek other new employment for his ship in the interest of his owner. The charterers could have no right to exact from him a useless inactivity of several months; nor, if this be so, can it make any difference that the charterers in fact objected to the landing of the cargo. Their objection might have made all the difference if the cargo could have been brought on, but as that was impossible, no prejudice could result to them if not called upon to defray the extra expense. And even if put to such expense, they would always have had their cross claim against the shipowner on the freight.

The next important fact which occurs is, that, the cargo having been landed, the consignees come forward and claim it. But they were not entitled to have it delivered to them till it had been brought to Taganrog, unless it was abandoned by the master, or on the navigation being again opened, he refused to bring it on or to forward it; they could not insist upon delivery short of the port of destination without paying the entire freight, except by arrangement with the shipowner, or the master as his agent. Without paying the entire freight, or coming to such an arrangement, the consignees must have waited four months for the iron rails, which, being wanted for the construction of a railway, it was important to them to obtain without any delay.

When, under these circumstances, I find the consignees asking for the cargo, and the master compelled to give them possession of it, I cannot suppose that the master intended to forego, on the part of his owner, his claim to freight; or that the consignees, in accepting the iron at Kertch, intended to claim it, or understood that they were receiving it free from all claim of freight. The master might be glad to be relieved from all further difficulty as to forwarding the iron; the consignees would be glad to have present possession, so that they might send it by land carriage to

Taganrog, instead of waiting four months to receive it by sea. The question of amount of freight payable—whether the whole or part—they left to be settled between shipowner and charterers in England. The master evidently thought he had earned the entire freight, for he believed that, having brought the cargo "as near as the ship could get" to the port of destination, he had done all he was bound by the charterparty to do. It is true that in landing the cargo under this mistaken impression the master had no intention of taking it on to Taganrog; but it appears that while he was in the course of landing the iron at Kertch the consignees applied for it, and it was delivered up to them, they giving a receipt for it, the master, on the other hand, insisting on payment of his freight. It seems to me that, under these circumstances, the consignees, who had no right to have the iron carried on to Taganrog till the navigation was again open, must be taken to have accepted it subject to the claim for freight pro ratâ. It is clear that the master had no intention of giving up the cargo without receiving his freight, for he protested against its being given up to the consignees by the authorities without the freight being paid. And, inasmuch as the consignees could not claim to have the cargo brought on to Taganrog till the navigation should be open, it is by no means certain that, if the cargo had not been delivered over to the consignees, the shipowner, on learning what had occurred, would not, in order strictly to fulfil the terms of the charter and prevent all question as to the payment of the entire freight, have provided a vessel to take the iron on whent he navigation was re-opened. And this would have been the more likely to happen, if the consignees, instead of demanding present delivery of the iron, had protested against its being left at Kertch, and had insisted on its being brought on to Taganrog when the navigation should admit of it. It is highly probable that the plaintiff would then have availed himself of the intervening period, and would have made his arrangements for bringing on the cargo. Of this tempus pœnitentiæ he was, as it seems to me, prematurely and unduly deprived by the act of the consignees, in obtaining the possession of the iron from the custom-house authorities.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Cockburn, C.J.

It must be borne in mind as a material fact in this case, and one which distinguishes it from the cases of *Hunter* v. *Prinsep* (1) and *Vlierboom* v. *Chapman* (2), that the master did nothing in the way of disposing of the cargo, or of abandoning it, so as to give up his lien on it for the freight. The cargo was given up to the consignees by the custom-house authorities, against the will of the master and notwithstanding his protest. The consignees could therefore, as it seems to me, only take possession subject to the rights of the captain and his owner, one of these rights being, unless clearly abandoned, that of forwarding the cargo when the time came, and so earning the entire freight. Here, again, it is by no means certain that, if the lien for freight claimed by the master had not been disregarded and the cargo handed over to the consignees, the owner would not in due time have sent it on to its destination.

Under these circumstances the case of *Luke* v. *Lyde* (3), which, as far as I am aware, has never been overruled, and which is binding upon us, appears to me to apply. In my opinion, though the charterers' agents protested against the landing of the cargo, yet the consignees, who as to the receipt of the cargo must be treated as the agents of the charterers, must be taken to have dispensed with the conveyance of the iron between Kertch and Taganrog, and to have accepted it subject to the right of the ship-owner to freight for so much of the voyage as had been performed. I think, therefore, that to that extent our judgment should be for the plaintiff. But my learned Brothers think otherwise, and judgment must therefore be entered for the defendants.

The judgment of Mellor and Quain, JJ., was delivered by

Quain, J.

QUAIN, J. It is unnecessary to recapitulate the facts of the special case, which have been fully stated by the Lord Chief Justice.

Under the circumstances the plaintiff contends,—first, that he is entitled to be paid full freight as on a performance of the whole voyage, or if not full freight, that he is entitled to be paid pro ratâ itineris up to Kertch.

(1) 10 East, 378. (2) 13 M. & W. 230.
(3) 2 Burr. 882.

In the first place, we think that the master was quite mistaken in supposing that a delivery at Kertch was a delivery so near to Taganrog as he could safely get. According to the judgment of this Court in *Schilizzi* v. *Derry* (1) the meaning of those words is, that the ship must get within the ambit of the port, although she may not be able to enter it. There is no pretence for saying that Kertch is within the ambit of the port of Taganrog.

It was next contended that the full freight was due, as the condition of the charterparty, on the performance of which it was made payable, had been complied with. By the terms of the charterparty the freight was to be paid, one third on signing the bills of lading, and the balance in cash in London against certificate of right delivery of the cargo.

It was argued that the receipt given by the consignees' agents, and set out in paragraph 17 of the case, was such a certificate. But we are of opinion, assuming that the consignees or their agents were the proper persons to give the certificate required by the charterparty, that the receipt is not a certificate of right delivery of the cargo within the terms of the charterparty, especially as against the present defendants, the charterers, who expressly protested against the discharge of the cargo at Kertch. It is merely an acknowledgment of having received the cargo, and is not the certificate of right delivery required by the charterparty.

It was further contended for the plaintiff that, as the consignees had taken possession of the cargo at Kertch, as described in paragraph 17, the whole freight was payable.

The case of *London & North Western Ry. Co.* v. *Bartlett* (2) was cited in support of this proposition. In that case it was held that the carrier of goods consigned to a particular place may deliver them at any other place that the consignee and the carrier may agree upon, and that in such case the carrier would be entitled to his full freight. So also in the case of *Cork Distilleries Co.* v. *Great Southern & Western Ry. Co.* (3), it was held by the House of Lords that where goods are delivered to a carrier to be carried to

(1) 4 E. & B. 873; 24 L. J. (Q. B.) 193.

(2) 7 H. & N. 400; 31 L. J. (Ex.) 92.

(3) Law Rep. 7 H. L. 269.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Quain, J.

a certain person at a certain place, the consignees may demand the goods of the carrier at another place, and the carrier will be justified in delivering the goods on payment of the full freight.

But in these cases the carrier was ready and willing to carry the goods to their destination and earn his full freight; and refrained from doing so at the express request of the consignees. In the present case, on the contrary, the master discharged the cargo at Kertch without any request from the consignees, and against the express protest of the charterers, and refused to carry it further to its port of destination; and it was not till after this refusal, and when the goods may be said to have been abandoned by the master, that the consignees took possession of them as holders of the bills of lading.

We think, therefore, that the cases cited have no application to the present case. It is said, in paragraph 19 of the case, that the cargo was "in due course" received by the railway company. But we cannot construe the language as intended to contradict or qualify the express statement in paragraph 17, describing the manner in which the cargo was received by the company.

It remains to consider the question whether the plaintiff is entitled to freight pro ratâ itineris, having carried the goods to Kertch. Claims of this kind usually arise in cases of disabled ships unable by the accidents of the seas to complete their voyage; and we are not aware of any case like the present, where the claim has arisen from the default of the master in refusing to proceed to his port of destination.

The rule on this subject was laid down by Dr. Lushington in the case of *The Soblomsten* (1) as follows: "To justify a claim for pro ratâ freight, there must be a voluntary acceptance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with." And the learned judge cites the case of *Vlierboom* v. *Chapman* (2), from the judgment in which case the rule is extracted in the words above quoted.

This case is founded on the earlier case of *Hunter* v. *Prinsep.* (3) In that case Lord Ellenborough says that the shipowner has

(1) Law Rep. 1 A. & E. at p. 297. (2) 13 M. & W. at p. 238.
(3) 10 East, 378, 394.

no right to any freight unless the goods are forwarded to their destination, "unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. . . ." He continues: "The general property in the goods is in the freighter; the shipowner has no right to withhold possession from him, unless he has either earned his freight or is going on to earn it." Applying these principles to the facts of the case before us, we feel bound to decide that in this case the claim for freight pro ratâ cannot be supported. This action is against the charterers on the charterparty, and so far from their having voluntarily accepted the goods at Kertch and dispensed with the further carriage of the goods to their port of destination, they gave the master express notice on the 19th of December, and before he had commenced to discharge the cargo (paragraph 12), that if he discharged the cargo at Kertch, that is to say, left it at Kertch without any intention of carrying it further, he would be held responsible for an infraction of the charterparty. It is impossible, therefore, as against the present defendants, to infer that they dispensed with the further carriage of the goods to Taganrog. The case, as far as the present defendants are concerned, is like *Liddard* v. *Lopes* (1), where a similar notice was given by the owners of the cargo, and it was held that no new contract to pay freight pro ratâ could be presumed against the merchant.

But assuming that defendants would be bound in this action by a voluntary acceptance of the goods by the consignees at an intermediate port, and a dispensation by them of the further carriage (a point about which we entertain considerable doubt, especially after the protest of the defendant's agents), we are of opinion that there has been no such acceptance in this case. In fact, the present case is one in which the master, by an unfortunate mistake, has left the goods at an intermediate port, and refused to carry them on to their port of destination, and it was not till after such refusal that the agent of the consignees took possession of them as holders of the bills of lading. They had no other course to pursue if they wished to preserve their own property.

(1) 10 East, 526.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Quain, J.

It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession, and that by reason of the consignees so taking possession he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight: for he had neither earned any freight nor was he going on to earn it; and he having declared that he discharged the cargo at Kertch and did not intend to carry it further, the parties had a right to take him at his word and act on that declaration, and treat it as a breach of the charter-party, and to take possession of the cargo which the master had so abandoned. (See on this last point the *Danube Ry. Co.* v. *Xenos* (1), *Frost* v. *Knight* (2), and the cases there cited.)

The case therefore seems to come within the third rule laid down by Dr. Lushington in the case of *The Soblomsten* (3), namely, that no freight is payable, if the owner of cargo against his will is compelled to take the cargo at an intermediate port.

It seems to us that the duty of the master was plain, in the absence of any fresh arrangement between the parties, either to wait at Kertch till the navigation was open and then proceed on his voyage, or to land and warehouse the goods at Kertch, and return and take them on by his own or another ship when the navigation was open.

For these reasons we are of opinion that the plaintiff is not entitled to recover any freight in this case, and that our judgment must be for the defendants.

We may observe, in conclusion, that the special case before us gives no information as to what ultimately became of the cargo of the *Meredith*. We are not told if it was ever forwarded to Taganrog either by the charterers or the consignees, nor how the transaction has been arranged, if it ever has been arranged, between the parties. We are therefore entirely ignorant whether in the result the present defendants, the freighters, ever derived any benefit or advantage whatever from the carriage of the cargo to Kertch. We cannot infer necessarily that they must have done so, for many cases are conceivable in which the leaving the

(1) 11 C. B. (N.S.) 152; 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 84, 284.

(2) Law Rep. 7 Ex. 111.

(3) Law Rep. 1 A. & E. at p. 297.

S. Jur. N.S. 434, 439.

cargo at an intermediate port might be of no benefit, but, on the contrary, cause a serious loss to the freighters.

In the jurisprudence of France and Germany the claim for freight pro ratâ itineris is not based on any such technical ground as a new contract to be inferred from a voluntary acceptance of the goods in such a way as to amount to a dispensation of their further carriage, but seems to be founded merely on the equity and reasonableness of the thing, that the shipowner who has carried the goods a part of the way, of which the freighter has had the benefit, should be proportionately indemnified: see Code de Commerce, Article 294–296, and Valin's Commentary on the Ordonnance de la Marine, Liv. iii. Tit. iii. Art. 9. The German Code, Article 633, expressly provides that in calculating the amount of that indemnity the question is not one of distance merely, but that the circumstances of the case on both sides in relation to the performed and unperformed part of the journey, including the value of the goods at the intermediate port, must be taken into consideration: German Commercial Code, Articles 632, 633, and Makower's Commentary on the German Code, note 123.

Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had in the result derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favour of a shipowner who had carried the cargo to within thirty miles of its destination, and of which part performance the defendants had the benefit, some of that "larger equity" alluded to by Lord Tenterden as exercised by Courts of Admiralty in similar cases: Abbott on Shipping, 11th ed. 1867, pp. 402–3. Lord Tenterden cites with approbation the judgment of Sir William Scott in the case of *The Friends* (1), in which that learned judge says: "This Court sits no more than Courts of common law do to make contracts between parties, but, as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of

(1) Edw. Ad. Rep. at pp. 247–8.

1876

METCALFE v. BRITANNIA IRONWORKS COMPANY.

Quain, J.

facts out of the contemplation of the contracting parties in the course of the transaction." Sir R. Phillimore, in the case of *The Teutonia* (1), after citing this judgment, adds that this jurisdiction is not confined to prize cases, but that it is a part of the general power which the Court always possessed.

However, as the point to which we have last adverted is not expressly raised by the case, we give no opinion on the subject.

Judgment for the defendants.

Solicitors for plaintiff: *C. C. Ellis & Co.*
Solicitors for defendants: *Hollams, Son, & Coward.*

June 27.

[IN THE COURT OF APPEAL.]

PURNELL *v.* THE GREAT WESTERN RAILWAY COMPANY AND HARRIS.

Practice—Order for New Trial where Verdict for one and against other Defendant—Power of Court of Appeal—Order LVIII., Rules 3, 5.

In an action against a railway company and H., the question was, whether the persons guilty of the alleged negligence were the servants of the company, so as to make the company liable, or of H. The jury found against the company, and in favour of H. The company obtained an order nisi for a new trial on the ground that the verdict was against the evidence; and by direction of the Court notice of the order was served on H. The Queen's Bench discharged the order, upon which the company appealed, but did not serve notice of appeal on H. The Court of Appeal, after hearing the facts of the case, ordered that the case should stand over, and notice of the appeal be served on H. H. appeared, but protested against the jurisdiction of the Court, under the circumstances, to call upon him to shew cause why a new trial should not be had as to him. The Court held that they clearly had jurisdiction, and on the merits made the order absolute generally for a new trial:—

Quære, per Mellish, L.J., whether the Court has not now power to order a new trial as to one defendant, without disturbing the verdict as to another, where the merits of the case justify such a course.

DECLARATION against the Great Western Railway Company and Harris, charging that they so negligently conducted themselves in unloading, removing, and delivering certain timber lying on a railway bridge of the company, that a balk of timber fell

(1) Law Rep. 3 A. & E. at p. 421.

over and struck the plaintiff who was lawfully passing underneath.

Plea, inter alia, not guilty; issue thereon.

At the trial, before Pollock, B., at the Monmouthshire summer assizes, 1875, two questions arose, 1st, whether there had been any negligence; and, 2nd, if there had, whether the persons guilty of it (who were undoubtedly in the employ of Harris) were at the time the servants of the railway company, so as to make the company liable, or the servants of Harris. The jury found for the plaintiff against the railway company, but in favour of Harris.

The company obtained an order calling upon the plaintiff to shew cause why there should not be a new trial, on the ground that the verdict was against the weight of evidence.

Notice of this order was served upon Harris by direction of the Court.

On the argument the Court of Queen's Bench discharged the order, Blackburn, J., being of opinion that there was evidence justifying the jury in finding that the persons guilty of negligence were the servants of the company; Lush, J., being of a contrary opinion.

The company then appealed, but served no notice of appeal upon Harris.

May 22, 23. *J. J. Powell, Q.C.*, and *Bosanquet*, argued for the company.

H. Matthews, Q.C., and *T. S. Pritchard*, for the plaintiff.

The Court, after hearing the arguments, were of opinion that there was a grave question whether the persons were not the servants of Harris, and as he was directly interested, directed the case to stand over and that Harris should be served with notice of the appeal (under Order LVIII., Rule 3), and also with an order (under Order LVIII., Rule 6), calling upon him to shew cause why a new trial should not be had on the ground that the verdict was against the weight of evidence. (1)

(1) *Powell, Q.C.*, for the railway company, suggested that, as it was for the plaintiff's benefit that a new trial should be had against Harris, the plaintiff should be the party to serve the notice, and the Court so ordered; but, quære, whether, according to the old practice and the cases cited, it was not the company's duty to have served the notice.

1876

PURNELL v. GREAT WESTERN RAILWAY CO.

June 27. *Staveley Hill, Q.C.*, and *Jelf*, for Harris. This Court had no jurisdiction to call upon Harris to shew cause why a new trial should not take place as to him. He was absolutely discharged by the verdict of the jury and the decision of the Court of Queen's Bench discharging the order for a new trial; and it was too late in this Court, the four days fixed for moving having elapsed.

[MELLISH, L.J. Are there not cases in which it has been held, under the old practice, that a new trial cannot be had against one of several defendants?

Pritchard, for the plaintiff, referred to *Doe* v. *Martin* (1), and *Belcher* v. *Magnay*. (2)]

Those cases only decide that there cannot be a new trial under the old practice, against or in respect of one only of several defendants. Here the plaintiff has been satisfied to let the verdict against him, in Harris' favour, stand, and he cannot, or ought not now, at this late stage, to be let in to say that the verdict was wrong.

JESSEL, M.R. In this case an objection has been taken to the jurisdiction of the Court of Appeal to call upon the defendant Harris to shew cause why a new trial of the action shall not be had. The action was brought by the plaintiff against the Great Western Railway Company and Harris, for an injury occasioned by the negligence of persons who were the servants either of the Great Western Company or of Harris. The jury found in effect that at the time of the accident they were the servants of the company, and therefore found a verdict against the company and in favour of Harris. The company moved for a new trial before the Queen's Bench Division. The company was directed by that Division to serve notice of the order upon the defendant Harris. When the order came on for argument, the Court being equally divided in opinion, one judge being in favour of the company and the other in favour of the plaintiff, the order was discharged, and the counsel for Harris of course was not called upon to argue, the decision being in his favour; at the same time it may be observed that the costs of attending on that occasion were refused to Harris.

(1) 13 M. & W. 811; 14 L. J. (Ex.) 128.

(2) 13 M. & W. 815, n.; 14 L. J. (Ex.) 305.

When the case came before this Court on appeal by the company, the Court, thinking there was a serious question to be argued as to whether the persons who were guilty of the negligence were the servants of Harris, before proceeding to decide the question between the company and the plaintiff, directed that notice of the appeal should be given by the plaintiff to Harris, so that he might shew cause why a new trial should not be had, and Harris has appeared under protest, and insisted that the Court of Appeal had no jurisdiction to make that order as to him, the four days having elapsed within which, as a matter of course, the order to shew cause why a new trial should not be had should have been moved, and it is insisted that this Court should not now entertain the application.

I myself have no doubt as to the jurisdiction of the Court; I think it is given in the plainest possible terms. But before considering what the jurisdiction is, it is necessary to consider what the practice at common law was before the Judicature Act. It seems to be established by the two cases to which our attention has been directed, viz. *Doe* v. *Martin* (1), and *Belcher* v. *Magnay* (2), that where a verdict has been found in favour of one defendant and against another, and the defendant against whom the verdict has been found shall move for a new trial, he was bound to serve a notice of the rule for a new trial on the defendant in whose favour the verdict was returned, and no new trial could be granted unless that proceeding was adopted. That seems to me a very reasonable rule and entirely coincides with the similar practice in the courts of equity.

That being so in the present case, it appears to me the railway company did all they could be reasonably required to do; they obeyed the direction of the Court in serving a notice of the order on Harris, and therefore it seems to me the only point now to be considered is, whether, Harris being present, a new trial should be granted.

It is quite true that there is no appeal by the plaintiff, nor is there any cross order moved for; and it is said that if the plaintiff anticipated the moving of the Court for a new trial by the

(1) 13 M. & W. 811; 14 L. J. (Ex.) 128.

(2) 13 M. & W. 815, n.; 14 L. J. (Ex.) 305.

1876

PURNELL v. GREAT WESTERN RAILWAY CO.

defendant against whom he had obtained a verdict, he should have moved for a cross order against the defendant in whose favour the verdict had been found. But under the old practice the defendant who moved the rule was bound to serve notice of it on the other defendant. Therefore, as the plaintiff did not desire a new trial, and in the event of the defendant, who should move for an order, obtaining one, the Court had full power to grant a new trial generally.

The question now is, what are the powers of the Court of Appeal? Under Order LVIII., Rule 2, it will be found that appeals to the Court of Appeal are to be by way of re-hearing, that is, it is not to be confined to the points mentioned in the notice of appeal. The 3rd rule is that notice of appeal shall be served on all parties directly affected by the appeal, but not on parties to the action not so affected. But the Court of Appeal may direct notice to be served on all the parties. Harris is a party to the action, and the rule has been exactly applied. Then Rule 5 is "The Court of Appeal shall have also the powers, &c. of the Court of first instance." We could therefore enlarge the time or do any other act that is necessary. Larger words, I think, could not be inserted, and it is not disputed, as I understand the argument, that the words are large enough to authorize what has been done, but it is said that it is not just that such a jurisdiction should be exercised. I am at a loss to see why. It is our duty to do that which the Court below ought to have done, and assuming, for the present purpose, that Harris is primâ facie liable and the railway company is not, and that the Court below should have granted a new trial, surely the Court below, before granting a new trial, would have heard the counsel for Harris to shew cause; and as they ought to have done so we ought to do. I think it is quite clear that the principles upon which justice ought to be administered manifestly call upon us to pursue the same course; and, now that Harris has been brought before us on appeal, to hear his counsel to shew cause why a new trial should not be granted. I think there is no good objection to be urged against the exercise of the jurisdiction of the Court.

MELLISH, L.J. I am of the same opinion. In order to deter-

mine whether the Court has jurisdiction to order a new trial as against Harris it is necessary to consider whether the Queen's Bench had any such jurisdiction. It would be a question whether the Court of Appeal could do what the Queen's Bench could not do, but if they had power the Court of Appeal can do what the Court below ought to have done. Now the authorities that have been cited seem to shew very clearly that under the old practice the Court could not grant a new trial as against one defendant, even in an action of tort, without granting it as to all. That was decided in the two cases which have been referred to by the Master of the Rolls. In *Price* v. *Harris* (1) the defendant asked for a new trial, and the Court put her under terms; but where one of several defendants got a new trial, it appears the Court had never granted a new trial as against one defendant without granting it as against all, and it was the duty of one defendant to bring the others before the Court. Since the Judicature Act, I rather think, if the justice of the case required it, the Court might grant a new trial against one defendant without the other, if the Court was satisfied that the defendant was properly omitted and should not be harassed; so that there was no necessity for a new trial as to that defendant. This is a case where the very essence of it is that if one defendant is liable the other is not liable, and, vice versâ, if one is not liable the other is liable. Assuming the verdict is right in saying it was a negligent act, and that this is a case in which the Court is of opinion that the railway company is entitled to a new trial, the company cannot have a new trial unless there is a new trial against Harris also; and it would be very unjust as against the plaintiff to go to a new trial against the railway company, without his having the chance of getting a verdict against Harris if the jury should take the view that the Great Western are not liable and Harris is. When the motion for a new trial was made in the Queen's Bench, an application was made to the Court whether Harris should be served. The Court said: You need not make him formally a party, so as to shew cause why there should not be a new trial, but let the order be served upon him so that he may have notice of it. What was the effect of that? The Court

(1) 10 Bing. 331.

1876

PURNELL v. GREAT WESTERN RAILWAY CO.

having come to the conclusion that that order ought to be discharged, the Court had no occasion to call upon Harris, because, in the event that happened of the order being discharged, Harris was in no respect prejudiced. But I cannot help thinking, that, if the Queen's Bench had come to the conclusion that there ought to be a new trial, they would not have gone to a new trial without Harris. It would have been manifestly unjust to grant a new trial against Harris without hearing him. The Court of Queen's Bench had jurisdiction on this very order to order Harris to shew cause why there should not be a new trial, and to hear him shew cause before they made the order absolute; and when the case came before us we might think it right to order a new trial as against the railway company, and that ought not to be done without hearing Harris. Now Harris not having been made a party to the order, we thought there might be a technical question whether he was before the Court, and in order to obviate any difficulty, we gave leave to serve him with a fresh order, but we did not say that was necessary to be done. I think the cases cited shew that the old rule might have been applied. In my opinion we have jurisdiction to order a new trial, if we think the verdict against the railway company wrong, as against the weight of evidence. The effect of that will be that there will be a new trial against Harris also, and it would not be right to order that new trial without first hearing Harris.

DENMAN, J. I am of the same opinion. I think this objection ought to be overruled, and that Harris was right in appearing before this Court to shew cause why a new trial should not be granted. I do not wish to add anything to the judgments of the Master of the Rolls and the Lord Justice beyond this. In the argument, Mr. Jelf seemed to catch at an expression of mine that there was no trace in any of the cases cited of the cases being decided on the ground that it was after the four days within which a new trial should be moved for. I did not intend that that should be used as an argument, as he ingeniously seemed inclined to use it, that that might shew that the matter had been disposed of. On the contrary, it appears to me a strong argument that there is no-

thing in the objection. After looking at the several cases in which this course has been taken, it seems never to have occurred to any of the learned judges who acted in those cases that there would be any such objection available; and that, I think, is a strong ground for thinking that there is nothing in that additional argument. That the Judicature Act does not limit the power of the Court is too obvious to require any argument at all. If the Court of Queen's Bench had power before, I think it is quite clear, à fortiori, that they and this Court have power now.

Staveley Hill, Q.C., and *Jelf*, then shewed cause on the merits on behalf of Harris.

The Court made the order absolute for a new trial, on the ground that the weight of evidence was in favour of the non-liability of the railway company. All costs of the motion and of appeal to be costs in the cause and to abide the event of the new trial.

Order absolute accordingly.

Solicitors for plaintiff: *Johnson & Weatheralls, for W. J. & L. L. Lloyd, Newport, Monmouthshire.*

Solicitor for company: *R. Nelson.*

Solicitors for Harris: *Taylor, Hoare, Taylor, & Cook.*

1876
May 24.

[IN THE COURT OF APPEAL.]

THE SWANSEA SHIPPING COMPANY, LIMITED, *v.* DUNCAN, FOX, & CO.

THE BRITISH AGRICULTURAL ASSOCIATION, LIMITED, CITED TO APPEAR.

Practice—Order XI., Rules 1, 4; *Order XVI., Rules* 17–21—*Citation by Defendant of third Party—Notice on Corporation out of Jurisdiction.*

Port 655
4 Ch D 480
2 Ch D 369
370-3
5 P D 39
5 C P D 208
16 Ch D 491
492.
8 Q B D 234

In order to entitle a defendant to serve a notice on a third person under Order XVI., Rules 17, 18, it is not necessary that the whole question between the plaintiffs, the defendant, and the third person should be identical; it is sufficient if it be primâ facie made out that a material question in the action is also a question between the defendant and the third person; and under such circumstances the Court will order service of the notice, if the plaintiff will not be prejudiced or delayed by the introduction of the third person.

Therefore, where an action had been brought against the defendants for breach of charterparty, by which they agreed to discharge a cargo of nitrate of soda as fast as the custom of the port of discharge would allow, and the defendants had sold, at Liverpool, to a company carrying on business in Scotland, the cargo to arrive, and it was shewn that, by the custom of the trade, of which the company were aware, on such a sale of such a cargo the buyers would be bound to discharge in accordance with the custom of the port:—

Held, that the defendants were entitled to an order citing the company to appear and take part in the trial under Order XVI., Rules 17, 18.

Held, also, that Order XI., Rules 2, 4, as to service of writs, &c., out of the jurisdiction, applies to the service of notices on third persons under Order XVI., Rules 17, 18; and that service of the notice on the company in Scotland was therefore good.

STATEMENT OF CLAIM: By a charterparty of the 18th of February, 1875, the plaintiffs' ship *Helen Burns* being then at Valparaiso, it was agreed the ship should proceed to Iquique and Pisagua, and defendants should there load a full cargo of nitrate of soda in bags, which plaintiffs agreed to convey to Queenstown or Falmouth for orders, and thence to a specified port of discharge as ordered, and deliver the whole of her cargo, which defendants agreed to discharge as fast as the custom of the port should allow; with 12*l.* a day demurrage. That the ship arrived at Leith, her specified port of discharge, but defendants did not discharge the cargo as fast as the custom of the port allowed, but kept her undischarged for thirty-one days beyond that period. Claim, thirty-one days demurrage at 12*l.* a day.

(a) See W N (1875) 10 Pt. II. 346 (b) See W N (1875) 10 Pt. II. 349

1876

SWANSEA SHIPPING CO. v. DUNCAN.

On the 15th of March an order was made by Master Unthank that defendants be at liberty to issue and serve notice, under Order XVI., Rules 17, 18, on the British Agricultural Association, Limited, at Leith, in Scotland, such notice to be accompanied with copy of statement of claim, and that the Association have ten days to appear to such notice.

The affidavit of one of the defendants, on which the order was obtained, after shortly stating the cause of action, stated that after the loading of the cargo, and before the arrival of the ship at Queenstown or Falmouth, the cargo was purchased from the defendants to arrive (through brokers at Liverpool, acting for buyers and sellers), by the British Agricultural Association, Limited, a company carrying on business in Leith. On the arrival of the ship at Falmouth the Association ordered her to discharge at Leith, and the Association on her arrival took discharge of the cargo over the ship's side, and the defendants took no part in such discharge. By the terms of the agreement of purchase, and according to the custom of the trade, the Association are bound to indemnify the defendants and repay them any sums due to the plaintiffs for the detention of the ship at her port of discharge.

The notice, after stating the cause of action by the plaintiffs against the defendants for damages for alleged detention of the ship at her port of discharge, proceeded: "The defendants claim to be indemnified by you against liability in respect of the alleged breach of charterparty, on the ground that, as buyers of the cargo and holders of the bill of lading, you neglected to unload the vessel at Leith, to which port she was ordered, with due despatch."

The order, &c., having been served at Leith, an application was made on behalf of the Association to Archibald, J., at chambers, to rescind the order, and he referred it to the Court.

The application was supported by an affidavit of the secretary of the Association, that the Association were only purchasers of the cargo, and were not, as alleged in the notice, holders of the bill of lading or any shipping documents, and were not parties in any way to the contract of affreightment. That the claim of the defendants against the Association arose, if at all, wholly in Scotland and beyond the jurisdiction of the Court, and must, if it exist at all, depend upon the custom of the port of Leith.

1876

SWANSEA SHIPPING CO. v. DUNCAN.

The bought and sold note was as follows: "British Agricultural Association, Limited. We have this day bought for you 1100 tons, more or less, being the entire cargo of nitrate of soda expected to arrive per *Helen Burns*, at 11*s.* 6*d.* per cwt., delivered at a safe port in U. K., or 11*s.* 9*d.* in a safe port between Havre and Hamburg. If ordered to U. K., sellers to pay usual charges, according to the custom of port of discharge. Lighterage, if any, to be paid by buyers. Payment in cash in fourteen days from last day of weighing. Payment before delivery if required."

Q. B. D.

April 11. *Castle*, in support of the motion to rescind the order. *J. C. Mathew* shewed cause in the first instance.

THE COURT (Cockburn, C.J., Quain, J., and Pollock, B.), after some hesitation, decided that the case was not within Order XVI., Rules 17, 18, as it did not appear that there was any question which was identical between the plaintiffs, the defendants, and the Association, the contract between the defendants and the Association being different from that under the charterparty between the plaintiffs and defendants; and the Court rescinded the master's order on this ground, without expressing any opinion upon the point as to the service.

C. A.

May 24. The defendants appealed; and an affidavit by one of the defendants was filed in addition to those before the Court below; some doubt was expressed as to whether the appellants had a right to use this affidavit, but it was ultimately read, and referred to by the Court in their judgments.

The following was the substance of the affidavit:—All charterparties to carry nitrate of soda from the west coast of South America to the United Kingdom contain a stipulation as to the discharge of the cargo exactly similar to the one in the present charterparty. The British Agricultural Association are very large buyers of nitrate of soda to arrive, and are well acquainted with the ordinary terms of charterparties for nitrate cargoes. It is a well-understood custom of the trade that where a cargo of nitrate is sold to arrive, the buyers of the cargo are responsible for the discharge and reception of the cargo in accordance with the terms of the charterparty for such cargo.

1876

SWANSEA SHIPPING CO. v. DUNCAN.

J. C. Mathew, for the defendants.

Thesiger, Q.C., and *Castle*, for the Association.

The plaintiffs did not appear.

Cohen, Q.C., as amicus curiæ, referred to the case of *Benecke* v. *Frost* (1), which had been decided by the Queen's Bench since the principal case was before that Division.

JESSEL, M.R. This is an appeal from an order of the Queen's Bench Division discharging an order of Master Unthank allowing the defendants to serve a notice on a company not parties to the action. The question turns on the effect of several rules in Order XVI. By Rule 17, "When the defendant claims contribution or indemnity, or any other remedy or relief, against any other person, or where, from any other cause, it appears to the Court or a judge that *a question* in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or judge may, upon notice being given to such last-mentioned person, make such order as may be proper for having the question so determined." Rule 18 requires the leave of the Court or a judge before issuing the notice, and gives directions as to the sealing of the notice and the service of it, which is to be according to the rules relating to the service of writs of summons, and may be in Form 1, Appendix B., which, after stating the claim of the plaintiff and the claim of the defendant against the third person, adds that if he wishes to dispute the plaintiff's claim, he must cause an appearance to be entered within eight days. By Rule 20, if the third person desires to dispute the claim, he must enter an appearance within the eight days; or he is to be taken to admit the validity of the judgment obtained against the defendant. Provided that a further time for entering an appearance may be allowed by a judge. Then there is the important Rule 21, that the Court or judge, if the person appears, is to give such directions as they may think proper for having the question determined, and "as to the mode and extent in or to which the person so

(1) Ante, p. 419.

1876

SWANSEA SHIPPING CO. v. DUNCAN.

served shall be bound or made liable by the decision of the question." Then as to the service of the notice out of the jurisdiction, Order XI., Rule 1, says by leave of the Court service of a writ, or notice of a writ of summons, may be served out of the jurisdiction, wherever, amongst other cases, the contract was made within the jurisdiction, which certainly includes the present case; and by Rule 4 the order giving leave to serve such notice shall limit a time within which such defendant—here the third person—is to enter an appearance, such time to depend upon the place or country where the notice is given.

The first objection is, that Leith is in Scotland, and that the rule as to the service of the notice to third persons does not apply to persons or corporations out of the jurisdiction; but Order XVI., Rule 17, says that service of this notice shall be according to the rules as to service of writs of summons, and Rule 1 of Order XI., therefore, clearly applies. Then the argument is that Rule 20 of Order XVI. requires the appearance to be within eight days, which is clearly not sufficient where the service is out of the jurisdiction in a distant country, and the proviso, as to getting the time extended, would be inapplicable to the case of a person abroad, and, therefore, that the enactments as to notice to third persons were not intended to apply to persons out of the jurisdiction. No doubt when Rule 20 was drawn this case of third persons out of the jurisdiction was not in the mind of the draftsman; but the answer to the objection is, by Rule 4 of Order XI. the order giving leave to serve a notice out of the jurisdiction is to name such a time for appearance as the necessity of the case as to time and place requires; and if the number of days allowed for appearance is more than eight, then Rule 20 of Order XVI. must be taken to be so far modified that an appearance within the time limited, though more than eight days, would be sufficient.

As to the second point, it is said that the whole cause of action between the plaintiff and defendant and between the defendant and the third person must be identical; and on this objection the Court of Queen's Bench seems to have decided against the order. I think the objection cannot be sustained. If the plaintiff objects to the third person being introduced, the Court would consider

1876

SWANSEA SHIPPING CO. v. DUNCAN.

whether the plaintiff would be prejudiced in any way or delayed in his action by such proceeding. But here the plaintiffs make no objection. The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action and as between the defendant and a third person; and in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all. And the point really is whether there is such *a question* in the present case, which can advantageously be tried and decided, not only as between the plaintiffs and the defendants, but as between the defendants and the British Agricultural Association.

The action is for the breach of a charterparty, and the statement of claim alleges that the defendants did not discharge the vessel as fast as the custom of the port of discharge (Leith) allowed, contrary to the terms of the charterparty, and claims thirty-one days demurrage at 12*l.* a day. The defendants say: We sold the cargo to arrive to the British Agricultural Association, and by the custom of the trade the purchasers would take upon themselves the liabilities of the charterparty so far as being bound to discharge according to the custom of the port. There is an affidavit filed which states this in effect, and this affidavit stands uncontradicted. But it is said that the defendants were bound to discharge the vessel and find a berth for her, whereas all that the buyer of a cargo to arrive is bound to do is to take delivery of the cargo; and that complicated questions would arise as to how far the delay was due to the default of the defendants, and how far to the default of the third persons, the defendants' vendees. But, independently of the affidavit I have referred to, by the contract between the defendants and their vendees, the latter are to name the port of discharge, and it seems to me, that, if the vendees are to name any port they please, whether the vendor has an agent there or not, it would be unreasonable if they were not bound to find a berth for and discharge the ship. This view is strengthened by the fact that, by the sold-note, the buyers are to pay for lighterage. On the whole, therefore, it does

1876

SWANSEA SHIPPING CO. v. DUNCAN.

appear to me that a material question is common both between the plaintiffs and the defendants and between the defendants and the third persons, as to whether the ship was discharged as fast as the custom of the port of Leith allowed.

KELLY, C.B. One of the questions between the plaintiffs and the defendants is whether the cargo was discharged according to the custom of the port of Leith; another is whether a berth was found for the ship. If a berth was not found, and the contract between the plaintiffs and defendants was broken, the defendants would be liable. Is not the company in Scotland liable to the defendants on the very same ground? They were purchasers of the cargo to arrive, and by that contract they would be liable to discharge the cargo according to the custom of the port: for we have an uncontradicted affidavit that they were well aware of the custom of the trade. Here, therefore, are third persons liable over to the defendants if the plaintiffs succeed in making out the defendants liable; and it is exactly a case coming within the order and rules in question. As to the other point, I agree with what the Master of the Rolls has said.

MELLISH, L.J. I am of the same opinion. There is no doubt that the defendants, who are sued as charterers for not discharging the ship at Leith within the time limited by the custom of the port, and so liable for demurrage, do claim to be indemnified by the Association who have purchased the cargo, and who, they say, were liable in the same way on the contract between them; and if the defendants make out a primâ facie case as to this, in my opinion the Court ought to allow the defendants to serve notice on the Association, in order to have that question determined as between them and the Association at the same time that it is determined as between them and the plaintiffs. I do not think we can come now to any final decision even on the point whether there is the same obligation as to the time of discharging between the plaintiffs and the defendants and between them and the Association; because to settle that might involve trying the whole case between the defendants and their vendees. And if it were made

to appear that the two questions were different, it might be right to refuse the order at once; but if a primâ facie case is made out as to the identity of a question between both sets of litigants, then the Act intends that there shall be no choice in the matter, provided the plaintiffs will not be prejudiced by the introduction of the third party. Here there is clearly a primâ facie case made out, because it seems but reasonable that under the contract between the defendants and their vendees, it should be implied by the custom of the trade that the vendees should discharge according to the custom of the port. The affidavit before us says that, and it stands uncontradicted. Moreover, upon the terms of the contract, the buyers are to name the port of discharge and pay lighterage, if any, which goes to show that as between them and the defendants they were the persons to find the berth and conduct the unloading and not the defendants.

Then it is said that the measure of damages, as between the plaintiffs and defendants and the defendants and the third parties may not be the same, for the latter would not be bound by the demurrage clause in the charterparty, as they had no knowledge of its terms, and it is not referred to in the contract of sale; but that is immaterial, the third parties would only be bound as to any question decided in the action to the extent directed by an order of the judge under Rule 21 of Order XVI.; and if they are only directed to be bound as to the custom of the port of Leith, they cannot be prejudiced by any other finding of the jury.

On the question of service of the notice out of the jurisdiction, I agree with what has been said by the Master of the Rolls.

DENMAN, J. I am of opinion that the order of the master was right and authorized both by Rule 17 and Rule 18 of Order XVI. As to the service, I agree with what the Master of the Rolls has said. As to the objection, that injustice would be worked if a third party were cited where the whole question between the plaintiff and the defendant and between the defendant and the third party is not identical, there might be something in the objection if there were no provision which enables one part of a matter in dispute to be decided without prejudice to the rest. But reading Rule 18 with

1876

SWANSEA SHIPPING CO. v. DUNCAN.

Rule 21, there is a power given to the Court or judge to make an order, so as to limit the effect of the notice by directing how far and on what question the third person is to be bound by the decision in the action, and thus to prevent any injustice being done.

Order of Queen's Bench reversed, and order for service affirmed, without costs. (1)

Solicitors for plaintiffs: *Williamson, Hill, & Co., for H. H. Field, Swansea.*

Solicitors for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

Solicitors for British Agricultural Association: *Simson & Co.*

July 15.

[IN THE COURT OF APPEAL.]

BOWER *v.* HARTLEY AND ANOTHER.

Practice—Parties—Citation of third Party—Notice by Defendant—Discretion of Court—Rules of Supreme Court, Order XVI., Rules 17, 18, 19, 20, 21.

The Court has power to order a notice to be served upon a third person, if there is one question common to all the parties, though the whole question to be tried between the plaintiff and the defendant is not the same as that which would arise between the defendant and the third person. But the exercise of the power is discretionary; and if the introduction of the third person will tend to prejudice or delay the plaintiff, leave will not be given to serve the notice.

THIS was an appeal from an order made by the Queen's Bench Division, setting aside an order which had been made by Lindley, J., at chambers, affirming an order of the master, giving the defendants leave to serve a notice upon a third person, not a party to the action, under Order XVI., Rule 18.

The writ in the action was issued on the 20th of March, 1876. By the statement of claim, delivered on the 13th of May, 1876, it appeared that the plaintiff, George Bower, was a gas engineer at St. Neot's. The defendants, Messrs. Hartley & Talbot, were insurance brokers at Liverpool, and had been employed by the

(1) See the next case. As to service in Scotland or Ireland, see now Order XI., rule 1*a*, of June 26, 1876.

plaintiff to effect insurances for him on cargoes shipped by him abroad. In March, 1875, the plaintiff commissioned the defendants to effect insurances to the extent of 6000*l.* upon a cargo which he was then about to send by the ship *Lucy* from West Hartlepool to Ensenada, in South America. The terms and conditions of the policies were to be those usual in such policies when effected in England. About the time of the sailing of the vessel the defendants notified to the plaintiff that they had insured the cargo for 6000*l.*, according to his instructions. The ship sailed from West Hartlepool on the 13th of April, 1875, but soon after leaving port she met with severe weather, and on the 14th of April she was stranded near Burnham, and the cargo was seriously damaged. The plaintiff alleged that he did not receive the policies of insurance until after the stranding of the vessel, and that he then discovered that the defendants had been guilty of negligence in effecting them, by reason of which he would not be, and actually had not been able to recover upon the policies as much as he would if they had been duly effected according to his instructions. The acts of negligence alleged were—

(1.) That the defendants had declared upon each of the policies as the value of the cargo a less sum than that for which the plaintiff had directed them to insure.

(2.) That the defendants had in one of the policies misdescribed the cargo, so as materially to affect the risk.

(3.) That the defendants had negligently permitted the insertion in one of the policies of the following condition—viz., "La présente assurance est consentie franc d'avaries particulières matérielles (casse comprise)," which was a condition unusual in such policies as the plaintiff employed the defendants to effect.

The plaintiff claimed 3000*l.* damages.

The defendants delivered their statement of defence on the 9th of June, 1876, and by it they denied that they had been guilty of any negligence, and said that they had effected the policies, and had acted in all respects, according to the plaintiff's instructions, and that if the plaintiff had not recovered the amount of his losses, this was due to his own fault in not furnishing proper particulars of his interest, or to the improper refusal of the underwriters to pay.

1876

BOWER v. HARTLEY.

The defendants had, in fact, effected one of the policies, a French one, for 3000*l.* through R. W. Leyland & Co., insurance brokers at Liverpool. The defendants applied in chambers for leave to serve Leyland & Co. with a notice under Order XVI., Rule 18, and leave was given accordingly on the 20th of May by a master, and on the 9th of June, Lindley, J., refused an application by Leyland & Co. to set aside the master's order.

The notice which had been served on Leyland & Co. under that order informed them that the defendants claimed to be indemnified by them against all liability to the plaintiff for the alleged negligence in respect of the French policy, and gave them notice that, if they wished to dispute the plaintiff's claim in the action as against the defendants, they must enter an appearance within eight days after service, and that in default of their appearing they would not be entitled in any future proceedings between the defendants and themselves to dispute the validity of the judgment in this action.

The defendants filed an affidavit, in which they said that if there had been any negligence in effecting the French policy it was that of Leyland & Co., to whom the defendants had communicated the plaintiff's instructions.

Leyland & Co. filed an affidavit, in which they denied that the plaintiff's instructions had ever been communicated to them by the defendants, and said that they acted solely upon the defendants' directions. With regard to the alleged misdescription of the cargo, they said that, after the policy had been effected, they had procured an "avenant," or addition to the policy, to be signed by the underwriters. And, as to the condition free from particular average, Leyland & Co. said that their agent in Paris effected the policy free from particular average, and under conditions which, they said, meant free from particular average unless stranded, sunk, or burnt, and that that was such a policy as the defendants had instructed them to effect.

On the 3rd of July, upon the application of Leyland & Co., the Queen's Bench Division rescinded the order of Lindley, J., and set aside the master's order and the notice which had been served under it.

July 15. The defendants appealed.

J. C. Mathew, for the defendants. The defendants want to have the question of the validity of the French policy decided in the presence of Leyland & Co. That is the main question in the action.

[MELLISH, L.J. If there is some question common to the defendants and the third parties, we have power to order that the decision of that question in this action shall be binding on them.]

There is also the question of negligence in effecting the policy. The defendants are willing to take the order in such a form as not to delay the plaintiff. Order XVI., Rule 21, shews that it is not necessary that the whole question between the plaintiff and the defendants should be the same as that between the defendants and the third parties. If there is one common question it is enough: *Benecke* v. *Frost* (1); *Swansea Shipping Co.* v. *Duncan.* (2)

[MELLISH, L.J. The question of negligence is entirely distinct. As between the plaintiff and the defendants, it depends upon his instructions to them. As between the defendants and Leyland & Co., it depends upon the instructions which the defendants gave to Leyland & Co. Leyland & Co. positively swear that the plaintiff's instructions were not communicated to them.

JAMES, L.J. The only common question seems to be whether the French policy covers the damage which has actually occurred.]

That is enough, and the defendants wish to bind Leyland & Co. by the decision of that question in this action.

French, for Leyland & Co. The evidence shews that the defendants authorized Leyland & Co. to insert the words "casse comprise," while they were not authorized by the plaintiff to do so. The jury will have great difficulty in distinguishing between the two cases.

Moulton, for the plaintiff. The plaintiff may be able to rely upon admissions by the defendants that the French policy is invalid, and such admissions would not be evidence against Leyland & Co. This would prejudice the plaintiff with the jury. Moreover, the case is set down for trial at Liverpool, and the commission day is fixed for the 22nd of July. If Leyland & Co. are served the trial of the action will probably be delayed.

J. C. Mathew, in reply. The question is only as to the construction of the policy. Admissions by the defendants will not be evidence,

(1) Ante, p. 419. (2) Ante, p. 644.

1876

BOWER v. HARTLEY.

or, at any rate, the question of evidence would be for the judge, not for the jury.

JAMES, L.J. I think, on the whole, we ought to affirm the order of the Queen's Bench Division. At first, I was very strongly of opinion that there was one question which might be separated from the others, and which might properly be tried in this action as between the defendants and Leyland & Co., viz. the question whether, according to French law, the policy did or did not cover the damage which has actually been sustained. But this question may be very materially affected by the introduction into the policy of the clause as to particular average, which appears to have been inserted with the knowledge of the defendants, but not with the knowledge of the plaintiff. Moreover, the plaintiff says that he will be prejudiced by the trial of this question as against the defendants if Leyland & Co. are introduced, because he will be able to rely as against the defendants upon some correspondence which he has had with them, while he will not be able to rely upon it as against Leyland & Co. On the whole, I think that the convenience of having this question determined once for all in this action is not enough to outweigh the injury to the plaintiff which may result from the introduction of the third parties.

MELLISH, L.J. I am of the same opinion. If there is a material common question which it is important to have tried once for all, the Court has power to make an order that a third party shall be bound by the trial of that particular question, even though he is not interested in the whole subject-matter of the action. But this power is a discretionary one, and in the exercise of its discretion the Court ought to consider whether the plaintiff's interests will be prejudiced or affected, and, if the plaintiff will be prejudiced or delayed, the power ought not to be exercised. In the present case the first point is whether the question of negligence between the plaintiff and the defendants would be the same as it would be between the defendants and Leyland & Co. Now Leyland & Co. swear positively that the plaintiff's instructions were not communicated to them, and therefore the questions of

negligence in this action and in the defendant's claim over against Leyland & Co. would be distinct, for they depend upon the effect of different instructions. Then there is the question whether the policy is binding according to French law, so that the insured can recover for particular average, the ship having been stranded, and it is contended that that is a question common to all the parties. But the effect of the policy may depend upon the words which were introduced into it with the knowledge of the defendants, but without the knowledge of the plaintiff; and, moreover, the plaintiff says that he may be able to rely upon admissions which are evidence as against the defendants, but which are not evidence as against Leyland and Co. Besides this, the assizes are just at hand, and it is impossible to say whether the effect of ordering the third parties to be served may not be to prevent the action being tried now. Taking all these circumstances into consideration, I think we shall best exercise our discretion by refusing to make any order to serve the third parties.

BAGGALLAY, J.A. I am of the same opinion. The rules give the Court a power which must be exercised with a due regard to all the circumstances, and so as not to prejudice any of the parties concerned. I was not much impressed with the argument on behalf of Leyland & Co., that they would be prejudiced by the proposed order, but I think that there is at any rate considerable doubt whether the plaintiff would not be prejudiced by it. In such a case the order ought not to be made.

Appeal dismissed with costs.

Solicitors for defendants: *Gregory, Rowcliffes, & Rawle, for Duncan & Hill, Liverpool.*

Solicitors for third parties: *Vizard, Crowder, & Co., for Yates, Son, & Stananought, Liverpool.*

Solicitor for plaintiff: *Walter Webb.*

1876
May 10.

THE QUEEN ON THE PROSECUTION OF J. B. SAUNDERS *v.* THE POSTMASTER GENERAL.

Telegraph Act, 1868 (31 & 32 *Vict. c.* 110), *s.* 8, *subs.* 7—*Compensation for Loss of Office*—"*Annual Emolument*"—*Allowance for Travelling Expenses.*

The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster General to purchase the undertakings of telegraph companies. By s. 8, subs. 7, every officer and clerk of any company, the undertaking of which may be so purchased, who has been not less than five years in the service of telegraph companies, and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies, and is in receipt of remuneration at a rate of not less than 50*l.* a year, shall, if he receives no offer of an appointment by the Postmaster General in the telegraphic department, &c., receive during his life from the Postmaster General, by way of compensation for the loss of his office from the time at which the Government takes possession of the company's telegraph, an annuity payable half-yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office, on the 24th of June, 1868.

Mandamus to the Postmaster General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return, that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance as an indemnity against the extra personal expenditure incurred or assumed to be incurred by him while travelling on the business of the company beyond his ordinary expenditure, namely 12*s.* 6*d.* for twenty-four hours' absence from head-quarters, and 5*s.* for twelve hours' like absence when such last-mentioned absence did not oblige him to sleep away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:—

Held, on demurrer, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation.

Affirmed 11 App. Cas. 19. C. A.

MANDAMUS, reciting that by 31 & 32 Vict. c. 110, it was enacted that it should be lawful for the Postmaster General, and he was thereby authorized with the consent of the Lords of the Treasury, to purchase, amongst other undertakings, the undertaking of

1876

THE QUEEN v. POSTMASTER GENERAL.

a telegraph company called the Electric and International Telegraph Company. That it was further enacted with respect to the purchase of the undertaking that every officer and clerk of the company who had not been less than five years in the service of telegraph companies and in receipt of a yearly salary, or who had not been less than seven years in the service of telegraph companies and was in receipt of remuneration at a rate of not less than 50*l.* a year, should, if he received no offer of an appointment by the Postmaster General in the telegraphic department, which should be deemed by an arbitrator appointed by agreement, or failing agreement, appointed by the Recorder of London for the time being, to be of equal value to the appointment held by him under the company, receive during his life from the Postmaster General, by way of compensation for the loss of his office from the time at which the Government should take possession of the company's telegraph, an annuity, payable half-yearly, equal, if he should have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th day of June, 1868, and if he should have been in such service less than twenty years the annuity should be diminished at the rate of one-twentieth for every year less than twenty years during which he had been in such service. That after the passing of the Act the Postmaster General purchased the undertaking and took possession of the company's telegraph. That one J. B. Saunders was at the time of the purchase an officer of the company, as superintendent of the Western and South Wales district of the company, and in receipt of a yearly salary and of remuneration at a rate of not less than fifty pounds a year, and had then been in the service of the said telegraph company, for more than seven years and less than twenty years, that is to say, for eighteen years. That Saunders lost his office by reason of the purchase by the Postmaster General of the undertaking, and received no offer of any appointment in the telegraphic department, and became entitled to receive during his life from the Postmaster General, by way of compensation for the loss of his office from the time when the Government took possession of the company's telegraph, an annuity, payable half-yearly, and calculated at the rate and in the manner before mentioned upon the

1876

THE QUEEN v. POSTMASTER GENERAL.

annual emolument derived by him from his office on the 24th day of June, 1868. And that a part of the annual emolument of his office consisted of expenses allowed him as superintendent of the Western and South Wales district of the Electric and International Telegraph Company, and that he duly requested the Postmaster General to assess compensation to him in respect of his loss of office as such superintendent, so far as regarded the expenses so allowed to him, which the Postmaster General refused to do. The mandamus then commanded the Postmaster General to assess compensation to J. B. Saunders, in respect of his loss of office as far as regards the expenses allowed him as such superintendent as a part of the annual emolument of his office.

Return, that Saunders as the superintendent of the Western and South Wales district of the company, was in receipt of a yearly salary, and that it was his duty as such officer from time to time, when required, to travel upon the company's business; and that previously to and at the time of the purchase the company had agreed with Saunders and other of their officers upon certain definite and regular rates of allowance, to be paid to the officers respectively as an indemnity against the extra personal expenditure incurred, or assumed to be incurred, by the officers respectively while engaged in travelling upon the business of the company, beyond their ordinary expenditure when not so engaged in travelling, which rates of allowance were respectively as follows: viz. 12*s.* 6*d.* for twenty-four hours' absence from headquarters, and 5*s.* for twelve hours' like absence, when such last-mentioned absence did not oblige the officer travelling as aforesaid to sleep away from home; and that the allowances from time to time paid to the said officers respectively in accordance with the said rates did not at any time form any part of the yearly salary or remuneration of the officers respectively, but were from time to time paid by the company to such officers respectively, as they well knew, for the purpose and with the object of indemnifying them respectively against the extra personal expenditure incurred, or assumed to be incurred, by them in manner aforesaid, but for no other purpose or object, and on no other terms, and for no other consideration whatsoever. And that the expenses alleged in this writ to have been allowed by the company to Saunders, as

such superintendent, and to have been a part of the annual emolument of his office, were allowances made and paid by the company to him in pursuance of the agreement, for the purpose of indemnifying him against the extra personal expenditure incurred, or assumed to be incurred, by him while so engaged in travelling as aforesaid, beyond his ordinary expenditure when not so engaged in travelling; and that the total amount of the allowances paid by the company to Saunders during the year which ended on the 24th day of June, 1868, was the sum of 58*l.* 17*s.* 6*d.*

Plea, that the allowances were not paid as an indemnity only against the extra personal expenditure incurred, or assumed to be incurred, by the officers respectively whilst engaged in travelling on the business of the company, beyond their ordinary expenditure when not so engaged in travelling, but were paid to the officers in all cases when travelling on the company's business, whether any actual extra personal expenditure was incurred by them or not, and were fixed payments paid to the officers when travelling on the company's business; and the officers were always employed in each year of their service for a large portion of the year in travelling upon the business of the company, and during the time they were so employed they were always paid the allowances, and saved the moneys, or a large part of the moneys, they would otherwise have expended upon food, board, and lodgings at home, and the allowances, being made or paid in the manner aforesaid, were a part of the annual emolument of the office of the said officers.

Demurrers to the return and plea respectively, and joinders in demurrer.

Sir H. James, Q.C. (*A. Charles* with him), for the prosecutor. The question arises upon the construction of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, subs. 7 (1), and it is simply whether

(1) The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster General to purchase the undertakings of telegraph companies. By s. 8, subs. 7: "Every officer and clerk of any company, the undertaking of which may be so purchased, who has not been less than five years in the service of telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than fifty pounds a year, shall, if

1876

THE QUEEN v. POSTMASTER GENERAL.

the prosecutor, upon being dispossessed of his office, was deprived of an "emolument" within the meaning of the section.

[BLACKBURN, J. Is it suggested that his allowance for travelling expenses was so handsome that he made a profit out of it?]

Yes. It is like the case of a commercial traveller who receives a salary, and is allowed in addition so much a day for his expenses and saves half the allowance. The word "emolument" means more than "salary." Suppose there were two clerks, one receiving 200*l.* a year without board and lodging, and the other 150*l.* a year with board and lodging, the latter, upon losing his office, would be deprived, not only of the 150*l.* a year, but of his board and lodging, and his "emolument" would surely be estimated at a sum equal to his salary plus the board and lodging. If the prosecutor had stayed at home his domestic expenses would have been greater.

C. S. Bowen (*Casserley* with him), for the defendant. The allowances in question are not an "emolument" within the meaning of the section. It was the intention of the legislature to give compensation in respect of a "salary" or "remuneration," each of which is the return for services. In the present case the allowance is neither part of the salary nor part of the remuneration. It was the duty of the prosecutor to travel upon his employers' business, and he received an allowance which was meant to be an indemnity against any loss. It was never intended that he should make any profit out of this allowance. He receives no more whether he saves or not.

[QUAIN, J. Suppose he were asked what he made by the office: he would put down the salary, then he would say, I travel six

---

he receives no offer of an appointment by the Postmaster General in the telegraphic department, &c., receive during his life from the Postmaster General, by way of compensation for the loss of his office, from the time at which the government takes possession of the company's telegraph, an annuity, payable half-yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th of June, 1868, and with respect to any such person who has been in such service less than twenty years the said annuity shall be diminished at the rate of one-twentieth for every year less than twenty years during which he has been in such service."

months in the year, for which I receive 12*s.* 6d. a day, half of which I put aside.]

The word remuneration must mean something paid for services rendered. It does not mean profit.

[BLACKBURN. J. I do not see why a man who is paid by percentages should not receive compensation in respect of them.]

The word "emolument" is not a word of larger meaning than the words "salary" and "remuneration," and is used to embrace what has already been described by those two words.

A. Charles, in reply. The word "emolument" was introduced by the legislature for the purpose of including the profit and advantage which persons like the prosecutor derived from their office, apart from money paid to them by way of salary.

BLACKBURN, J. I think in this case the judgment ought to be technically for the Crown, though in reality it is against the Crown, as the Postmaster General is the defendant, and that the compensation claimed should be assessed. What the amount of that assessment is to be is a different question altogether, and is not now before us. The subsection of the Act on which the whole matter turns is, "That every officer and clerk of any company, the undertaking of which may be purchased, who has been not less than five years in the service of telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than 50*l.* a year, shall be entitled to compensation." Now, the first question is, what is meant by that word "remuneration" in the second clause, and Mr. Bowen argues that it is contrasted with a yearly salary, and means the case where a man has been in receipt of a salary of 50*l.* a year for five years. He is to have compensation, if he has been in receipt of a salary paid by weeks or months, which in the aggregate amounts to not less than 50*l.* a year, and it applies to no other case. But I think the word "remuneration" is a wider term and means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them. Consequently, I think if a person was in the receipt of a payment, or in the receipt of a percentage, or any kind of payment which

1876

THE QUEEN v. POSTMASTER GENERAL.

would not be an actual money payment, the amount he would receive annually in respect of this would be "remuneration," and consequently I think that this statute, in the early part of it, must be construed to extend not only to money payments but to any payment given as a remuneration for his services in the office. That being so, he is entitled to an annual compensation, which is to be a certain proportion of the annual emolument derived from his office; and the facts appear to be in this case that the officer in question has been in the habit of giving his services partly at home and partly while travelling, and when he travelled his ordinary salary ran on, as I understand, but his board and lodging, that is, his expenses when travelling, were paid by the company, and instead of making him bring an account of all he expended and then repaying him, they agree he shall receive a certain fixed sum for his expenses while so travelling.

The first question is, Is there any emolument derived from that? I should say myself, that if the fact be that the 12*s.* 6*d.*, the amount allowed him, exactly compensated him for his expenses, which of course is a possible fact, that he did not make either profit or loss by it; or, as very probably if it comes to the arbitrator he may say, "You and your employer having acted together, on the principle that you received a sum of money for your travelling expenses, it must be taken as against you that it was an exact equivalent, and if you did make a profit you ought not to have done so." In either of those views the arbitrator may say that the prosecutor is to get nothing for the profit that he has made out of the 12*s.* 6*d.* that was paid; but I am quite unable to perceive, when he was taken from home, and when most clearly something would be reduced in his home expenses (inasmuch as whatever he paid for himself to his butcher and baker at home, this, during the time he was travelling, would be saved), that he did not receive some remuneration. I liken it to the case of a domestic servant who receives wages at a certain rate, and also has board and lodging. There seems to me no doubt that his receipt of the board and lodging is part of the remuneration, and if he was dismissed improperly and unlawfully, the measure of the damages would be not only the money paid to him, but the money and money's-worth in remuneration for his services, which he

would have received if the contract had been carried out; and, therefore, to that extent there is, in the present case, something,—it may be little or it may be much, and it may turn out it is not worth this contest,—still there would be something which would come within the term "remuneration," and I think the "emolument" means all by which he has benefited. In either case where he has a fixed salary or where he has a remuneration for his services, the emolument would be that by which he made a profit, and which has been taken away from him by the Government purchasing the undertaking. I say no more upon it than that is the principle, in my mind, on which the person who has ultimately to assess the damages will have to act.

QUAIN, J. I am of the same opinion. In my judgment the question turns upon the meaning of the expression "annual emolument," and I find on looking at Johnson's Dictionary, that "emolument" is defined to be "profit or advantage," and therefore it means the annual profit or advantage which the prosecutor has derived from the office. Surely it cannot be doubted for a moment that, in ascertaining what is the annual profit and advantage that he derived from his office, you must take into consideration the sum paid him for travelling expenses, and taking the whole of that into consideration, does he derive any annual profit or advantage from it? If he does, that is what he is entitled to, and that must be taken into consideration in calculating the amount of compensation. It appears to me to turn on that word, which has a wider meaning than the word "remuneration" in the earlier part of the section.

Judgment for the Crown.

Solicitors for prosecution: *Childs & Batten.*
Solicitor for defendant: *W. H. Ashurst.*

1876
Jan. 24.

FOSTER AND ANOTHER *v.* GAMGEE AND ANOTHER.

Costs—Plea of Bankruptcy of Plaintiff after Plea, with other Pleas—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 142—*Reg. Gen.* 22 *and* 23 *T.T.*, 1853—*Order XX. Rules* 1–3 *of Act of* 1875.

5 C.L.D. 84 S
10 Q.B.D. 115

The defendant pleaded pleas in bar of the action, and afterwards by leave of a judge, under s. 142 of the Common Law Procedure Act, 1852, pleaded in addition the bankruptcy of the plaintiff since action brought, and the plaintiff confessed the plea:—

Held, that, under rr. 22 & 23 of T.T., 1853, the plaintiff was entitled to judgment for his costs up to the time of such pleading.

Semble, that the effect of Order XX., Rules 1–3, is the same.

To a declaration for breach of an agreement, the defendants pleaded denying the agreement and several other pleas going to the merits. Issue having been joined, and notice of trial given, on the day of the trial the defendants pleaded the bankruptcy of the plaintiffs since the commencement of the action, under an order at Chambers under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 142, on an affidavit that the trustees had declined to continue the action; and the plaintiffs confessed the plea.

The pleadings were under the old system; but the trial did not come on till after the Supreme Court of Judicature Acts had come into operation, and an order had been made by Lord Coleridge, C.J., under s. 22 of the Act of 1873, that the trial should take place under the old procedure.

Notice of motion having been given for an order that the plaintiffs be at liberty to sign judgment for their costs up to the time of the plea of bankruptcy,

Waddy, Q.C., in support of the motion. The proceedings took place under the old practice, it therefore would seem that r. 22 or 23 of Reg. General. of T.T. 1853, is applicable to the case, and not Rule 3 of Order XX. of the new orders under the Act of 1875.

[BLACKBURN, J. The new rules seem to be substantially the same. The question is, what was the law before?]

Under the rules 22 and 23 of T.T. 1853, it has been held that, even where a plaintiff confesses a plea that he has become a convicted felon, he is entitled to the costs up to the time of plea

pleaded: *Barnett* v. *London and North Western Ry. Co.* (1); see cases collected in Day's Common Law Procedure Acts, p. 499.

[BLACKBURN, J. Confessing the plea does not confess the cause of action. The other issues are not disposed of.]

The defendants, by pleading the plea of bankruptcy, have prevented the plaintiffs from trying the case on the merits.

[LUSH, J. The plea amounts to this: that the plaintiffs since the action was brought have become disabled from suing.]

Woolf, for the defendants. Rules 22 and 23 of T. T. 1853, do not apply. The plea of bankruptcy of the plaintiffs after action brought can only be pleaded by leave of a judge, under s. 142 of the Common Law Procedure Act, 1852; and in Bullen and Leake on Pleading, p. 453, it is said a plea puis darrein continuance may be pleaded with other pleas.

[*Waddy, Q.C.*, referred to *Plummer* v. *Hedge*. (2)

BLACKBURN, J. In *Dunn* v. *Hill* (3), Lord Abinger, C.B., says: "By pleading a plea puis darrein continuance the defendant abandons all other defences."]

The plea of bankruptcy of the plaintiff after action is different from other pleas puis darrein continuance, it can only be pleaded, under s. 142 of the Common Law Procedure Act, 1852, by leave of a judge.

[BLACKBURN, J. There is nothing said about pleading it with other pleas.

LUSH, J. The plea has precisely the same effect as before, when pleaded after the conditions imposed by s. 142 have been complied with.

BLACKBURN, J. *Plummer* v. *Hedge* (2) and *Dunn* v. *Hill* (4) shew what the former practice was.

QUAIN, J. Under rule 22 of Trinity Term, 1853, all the pleas stood, but if the plaintiff confessed the plea of a defence arising after action brought, he was still entitled to the costs of the cause.]

Tetley v. *Wanless* (5) is to the contrary.

[LUSH, J. That turned on the effect of the deed which was to release the costs.]

(1) 5 H. & N. 604; 29 L. J. (Ex.) 334.
(2) 24 L. J. (Q.B.) 24.
(3) 11 M. & W. at p. 474.
(4) 11 M. & W. 470.
(5) Law Rep. 2 Ex. 275.

1876

FOSTER v. GAMGEE.

Under Order XX., Rules 2, 3, at all events, the Court has a discretion as to disallowing the plaintiffs their costs. The plea of bankruptcy was not pleaded till after these rules came into operation.

BLACKBURN, J. I am of opinion that the plaintiffs are entitled to sign judgment for their costs up to the time of the plea of bankruptcy. The plea of bankruptcy of the plaintiffs since action brought is in the nature of a plea puis darrein continuance; the case of *Dunn* v. *Hill* (1) is an authority for this, and that by such a plea the defendant waived all previous pleadings. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 142, so far altered the law, that it forbad the bankruptcy of the plaintiff to be pleaded in bar, unless the assignees declined to continue the action, but if they declined, or did not give security for costs within the time limited, the defendant might plead the bankruptcy; and on such a plea, by rule 23 of Trinity Term, 1853, the plaintiff was at liberty to confess the plea, and was entitled to the costs of the cause up to the time of the pleading. This rule sometimes was thought to work injustice, as in *Plummer* v. *Hedge* (2), in which the defendant was accordingly allowed to withdraw the plea of bankruptcy and go on with his defence under the other pleas; but the ground of giving the defendant this permission was that the effect of rule 23 was to apply to pleas of bankruptcy or insolvency under s. 142 the old rule which applied generally to other pleas puis darrein continuance; and that the plaintiff, by confessing the plea, was entitled to the costs, although there were other pleas on the record.

LUSH, J. I am satisfied that the intention was not to make any difference in this respect between a plea of bankruptcy and any other plea puis darrein continuance, and therefore rule 23 applies to entitle the plaintiffs to the costs they ask for.

QUAIN, J. Before the Common Law Procedure Act, 1852, a plea of bankruptcy of the plaintiff after action brought, which was a plea in bar to the further maintenance of the action, could not be pleaded with other defences; by rule 22 of Trinity Term,

(1) 11 M. & W. 470. (2) 24 L. J. (Q.B.) 24.

1876

FOSTER v. GAMGEE.

1853, the defendant was allowed to plead a plea of a defence arising since the action commenced, together with defences arising before, but although the defendant was allowed to do this, yet the consequence was the same as before, that if the plaintiff confessed the plea, the other defences fell to the ground, and the plaintiff was entitled to costs up to the time of pleading. Order XX., Rule 3, appears to be the same in effect as r. 22 of Trinity Term, 1853.

Order absolute.

Solicitor for plaintiffs: *G. Butcher.*
Solicitors for defendants: *M. Abrahams & Roffey.*

[IN THE COURT OF APPEAL.]

Feb. 10; *May* 2.

POLAK AND ANOTHER *v.* EVERETT.

Principal and Surety—Interference with rights of Surety—Discharge.

N. was indebted to the plaintiffs, and by deed agreed, first, to pay them 3400*l.* on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of 6000*l.*, and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book-debts due to him, to the nominal amount of 8000*l.*, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value of 6000*l.* Subsequently an arrangement was made between the plaintiffs and N., by which, for an equivalent in shares and cash, they released to him their interest in the book-debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of 2250*l.* in the amount of shares:—

Held, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him.

DECLARATION on a guarantee, by which the defendant guaranteed the performance of an agreement made by one Nazarkiewich with the plaintiffs.

The defendant pleaded, on equitable grounds, two pleas, to the effect that after the date of the guarantee the plaintiffs, without the defendant's knowledge or consent, made another agreement

1876

POLAK v. EVERETT.

with Nazarkiewich, by which the terms of the previous agreement were materially varied, and the defendant thereby released.

Joinder in issue.

At the trial, before Denman, J., at the Middlesex Michaelmas sittings, 1875, it appeared that, on the 20th of December, 1873, a deed was made between the plaintiffs and one Nazarkiewich, in which it was recited that Nazarkiewich was indebted to them in the sum of 3400*l.*, including interest, and that he had arranged to dispose of his business to a company about to be formed under the title of "E. Nazarkiewich & Co.," and that the 3400*l.* should be liquidated in manner following. The agreement then stipulated, first, that Nazarkiewich should pay the 3400*l.* on or before the 15th of February, 1874, and that upon such payment the plaintiffs should transfer to him certain securities which they held; secondly, that he should, within three days after the first allotment of shares in the company should have been made, transfer to the plaintiffs shares to the nominal value of 6000*l.*, and that he should redeem such shares at par within twelve months from the 1st of January, 1874; thirdly, the 6000*l.*, or the part unpaid, was to bear interest at 5*l.* per cent. from the 1st of January, 1874, credit to be given by the plaintiffs on any dividends received from the shares; fourthly, that the book-debts of Nazarkiewich, to the nominal amount of 8000*l.*, should be collected by M. Vispé, and should be divided, as collected, equally between the plaintiffs and Messrs. Tampier Frères, and the amount so paid to the plaintiffs should be applied towards redemption of the shares in the intended company, and whenever a sum equal to 250*l.*, or any multiple of 250*l.*, the amount into which the shares of the company were divided, should have been received by the plaintiffs, they should re-deliver to Nazarkiewich a number of shares taken at par value, equivalent to the 250*l.*, or multiple of 250*l.*, received by them.

Upon the same day the defendant gave the plaintiffs the following guarantee:—

"To Messrs. Polak Brothers,—In consideration of your having signed an agreement, dated this 20th of December, 1873, made between J. M. Polak and J. Polak and E. Nazarkiewich, I hereby guarantee the fulfilment by the said E. Nazarkiewich of the provisions of such agreement, so far only as concerns the full redemp-

tion of the shares, &c., therein mentioned of the value of 6000*l.*, on or before January 1, 1875."

After the date of this guarantee the business of Nazarkiewich was formed into a company and shares were allotted, but he did not perform his agreement to transfer to the plaintiffs shares to the amount of 6000*l.* On the 1st of July, 1874, an arrangement was made between the plaintiffs and Nazarkiewich under which he handed to them thirteen paid-up shares in the company, representing 3750*l.*, also four acceptances by the new company for 250*l.* each, and 190*l.* in cash, and the plaintiffs signed a receipt as follows, embodying the terms of the arrangement:—

"Received of Mr. E. M. Nazarkiewich thirteen fully paid-up shares of 250*l.* each" (enumerating the securities received).

"And also 190*l.* in cash collected by M. Vispé, the whole amounting to 4940*l.*, being in part discharge of our claim of 6000*l.*; and, provided the above bills are paid at maturity, we agree to release our charge or interest in the book-debts of Mr. Nazarkiewich."

On the 7th of July Nazarkiewich sold the book-debts of which he had thus obtained possession to E. Nazarkiewich & Co., Limited, the company to which he had transferred his business. The defendant did not agree to these transactions with regard to the book-debts, but it appeared that he was a shareholder in and chairman of the company, and was present at meetings when the purchase of the book-debts was arranged. On the 29th of December, 1874, the defendant was required, under his guarantee, to make good a deficiency to the amount of 2250*l.* in the shares which Nazarkiewich had agreed to deliver, the plaintiffs giving credit for 1250*l.* received from the book-debts. He disclaimed liability, and the present action was commenced.

A verdict was directed for the plaintiffs for the amount claimed, with leave to move to enter judgment for the defendant on the pleas, the Court to have power to draw inferences of fact.

Notice of motion having been given accordingly,

McIntyre, Q.C., and *J. C. Mathew*, in support of the motion, were stopped.

Philbrick, Q.C., and *R. E. Webster*, shewed cause. The plain-

1876

POLAK v. EVERETT.

tiffs were entitled to the verdict. It is true that a moiety of the book-debts was security for the redemption of the 6000*l.* shares, but even if the book-debts had realised 20*s.* in the pound, they would not have covered the whole liability. If there is a suretyship for 5000*l.*, with a collateral security for 2000*l.* which the creditor sells without the consent of the surety, the surety is not discharged. He can say you have improperly dealt with the security, which ought to stand for 2000*l.*, but he cannot say that he is released from liability to the whole 5000*l.* Here the nominal amount of the debts was only 8000*l.*, but a large proportion were classed as bad, and the price agreed to be paid for all of them by the company was only 4000*l.* In *Wulff* v. *Jay* (1), where the creditors had a mortgage of the debtor's lease, plant, and fixtures, which was not registered under the Bills of Sale Act, but they allowed the debtor to remain in possession and thereby lost the security, it was held that the surety was discharged, but only to the amount the goods were worth. So here the surety cannot be entitled to more than the full benefit of the security for 4000*l.*, leaving 2000*l.* recoverable against him.

[BLACKBURN, J. That was a case of laches. There is a great distinction between a negligent act injuring the surety and an intentional act which injures him.]

The reason why the surety is discharged by any variation of the terms of the agreement with the principal debtor is because he is prejudiced thereby. But here, the defendant had the same benefit which he would have had under the original contract, the full collection of a moiety of the book-debts, and his equitable right to have recourse to the collateral security is not injured.

[BLACKBURN, J. In *Samuell* v. *Howarth* (2) Lord Eldon says, that if there be an alteration of the rights of the surety, though only nominal, and for his benefit, he is discharged.]

Where time is given, or the agreement varied in respect only of part of the debt or security, the rule does not apply.

[BLACKBURN, J. This point is quite new to me.]

As to the effect of a variation of the surety's rights in respect of part only of his liability, see *Rees* v. *Berrington* (3); *Harrison* v.

(1) Law Rep. 7 Q. B. 756. (2) 3 Mer. 272.
(3) 2 Ves. 540; 2 Wh. & T. L. C. 4th ed. 974.

Seymour (1); *Watts* v. *Shuttleworth* (2); *Davies* v. *Stainbank*. (3) Moreover, it is not open to the defendant to raise the point, as he was chairman of the company, and the plaintiffs were led to believe that he assented to the sale of the book-debts.

BLACKBURN, J. We think that the defendant is entitled to judgment, on the ground that what has taken place has discharged him as a surety.

Now, first, upon the leave reserved, with power for the Court to draw inferences of fact, we must take it to be the fact that though the defendant was well aware of this release being executed, he was not an assenting party to it. Then it is argued that knowledge on the part of the surety that there is going to be a release of a part of the security is enough without assent. I cannot see any authority for that. In *Pickard* v. *Sears* (4), it was held that he who stands by and sees another alter his position on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration. But the rule was corrected in *Freeman* v. *Cooke* (5), where it was said that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself. But to say that a person, who, being a surety, becomes aware that the creditor is going to give time or do something else which, if done without his assent, may discharge him, is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited. That brings us to the question whether what was done in this case did, upon the established principles of equity, discharge the surety.

It has been established for a very long time, beginning with *Rees* v. *Berrington* (6) to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact

(1) Law Rep. 1 C. P. 518.
(2) 7 H. & N. 353.
(3) 6 D. M. & G. 679, 689.
(4) 6 Ad. & E. 469, 474.
(5) 2 Ex. 654; 18 L. J. (Ex.) 114.
(6) 2 Ves. 540; 2 Wh. & T. L. C. 4th ed. 974.

1876

POLAK v. EVERETT.

of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell* v. *Howarth* (1) by Lord Eldon, is, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: "The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which it is far too late to think about now. I must own I have had considerable doubts about the justice of that principle, but from the time of *Rees* v. *Berrington* (2) it has been undisputed law, and nothing but the legislature can interfere to alter it.

Now, in the present case the interference with the rights of the surety is not by giving time to the debtor, but it is equally as great an interference. The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book-debts to the person collecting them. That equitable right has been taken away by his wilful act, and in *Mayhew* v. *Crickett* (3), upon this very question, Lord Eldon says: "When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, You have discharged the surety from whom I ought to have

(1) 3 Mer. 272, 279.

(2) 2 Ves. 540; 2 Wh. & T. L. C. 4th ed. 974.

(3) 2 Sw. 185, 193.

compelled contribution, either in my own name in equity, or using your name at law." Lord Eldon is speaking here of withdrawing execution on a judgment; the precise amount does not appear, and it was possibly very small; but it was held that the creditor having done this did discharge the surety, on a view which, according to Lord Eldon, is obvious in law and equity.

Now, admitting this to be so, it has been argued by counsel for the plaintiffs that there is a distinction to be taken to this extent, as I understand their argument. The debt here secured—for it is really the same thing as if the debt were secured—is 6000*l.* Half of the book-debts only were pledged as an equitable security for this amount, and they were a security for every portion of the 6000*l.*, but if they paid 20*s.* in the pound they would only produce 4000*l.*, so that there would be some 2000*l.* which would still remain for which the surety would have been liable, and the argument is that the interference with the rights of the surety in respect to a matter which, though a security for the whole debt, is of less value than the whole debt, does not come within the principle and the authorities. As far as the authorities go, none were cited in which that distinction was taken. There does not seem to be the least authority for it on principle, once concede the rule that where the creditor wilfully interferes with the rights of the surety and alters the equitable rights which he had acquired, alters them, even though it may be for the surety's benefit,—without the surety's assent, the surety is discharged. And it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt. There are two or three distinctions to be taken notice of. For instance, there is *Wulff* v. *Jay* (1)—and that case was perfectly rightly decided—where a person is a creditor with a pledge or surety he is in equity bound to account not only for the money he has actually made out of the pledge, but also for the moneys he might, ought, and should have made out of the pledge, and he must allow for that whether he made them or not, and if by laches he has diminished the value of the pledge he is bound to allow for the sum

(1) Law Rep. 7 Q. B. 756.

1876

POLAK v. EVERETT.

he ought to have made. But his laches does not discharge the surety, for it does not come within the principle which applies where the surety's rights have been changed or varied. His rights remain as before. The case seems to be like the case where the creditor does not choose to sue the debtor. That does not discharge the surety, for the surety's right remains untouched. So in the case where there is a failure to make the most he could of the pledge, that does not in the slightest degree discharge the surety, though the amount which ought to have been recovered by making a proper use of it is to be allowed in reduction of the debt. In the present case it is not a question of laches, or not making the best of the pledge that could be made, but it is a case of preventing the surety having any recourse against these book-debts at all. There are other cases, but I do not think it is necessary to go into them. There is a distinction made in equity between those rights of the surety which he acquired at the time when he entered into the suretyship, such as securities the creditor then held, and other rights, and he has a right to all those, and *Mayhew* v. *Crickett* (1) establishes, if that security is destroyed, the debt is gone. There are other cases which turn upon this. After the security is established, the surety has a right to have the benefit of new securities, but those not being a part of the original right it is a different question whether the dealing with those would discharge the surety. The present case does not come within that principle. Taking it as it stands here, it seems to me that the defence is made out, and consequently that the defendant should have judgment.

MELLOR, J. I am of the same opinion on all the grounds referred to by my Brother Blackburn, and I will not say a word except that as at present advised I am not in a position to concur with him as to the extreme hardship which arises from the rule established in equity. I am not quite sure it does not proceed upon high grounds of policy and convenience. I think it is the old question of contract, and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or

(1) 2 Sw. 193.

not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into. On that ground I abstain from saying that I entirely concur in the opinion that there is any great injustice or hardship resulting from the rule established in equity.

QUAIN, J. I am entirely of the same opinion. On the first point, namely, whether, assuming the surety did not consent to this contract on the 1st of July, he is not discharged, I think that he is discharged. I think the convenience and policy of the matter, if we were to go into that, is that the contract of the surety should not be altered without his consent, and that the creditor should not undertake to alter the contract and then say: Although the contract has been altered, and I put it out of my power to carry it out by my voluntary act, I now offer you an equivalent, and put you in the same position, as far as money is concerned, as that in which you would have been if I had not done this. I think that would be a very unsafe state of things, and would be directly contrary to the principle laid down by Lord Loughborough in *Rees* v. *Berrington*. (1) He says in that case, "I cannot try the cause by inquiring what mischief it might have done. I am of opinion the surety is discharged. This produces no inconvenience to anyone, and it only amounts to this, that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." These appear to me to be the principles that govern the case here. Without the surety's consent the creditor here has disposed of these book-debts in an entirely different manner to that in which it was intended they should be applied under the original contract. I agree with my Brother Mellor that it is a thoroughly sound and safe principle that, where

(1) 2 Ves. 540.

1876

POLAK v. EVERETT.

the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine which ought not to be impeached, and cannot be impeached, because it is established by authority.

Then, with regard to the second point, whether we ought to draw the inference of fact that the defendant consented to the arrangement, I agree with my Brother Blackburn that the fact of the defendant merely standing by, having no duty to communicate with the plaintiffs, does not amount to a consent. Therefore on both points the defendant is entitled to judgment.

Judgment for the defendant.

On appeal,

May 2. *Philbrick, Q.C.*, and *R. E. Webster*, for the plaintiffs, urged the same arguments as in the Queen's Bench Division.

McIntyre, Q.C., and *J. C. Mathew*, for the defendant, were not called upon.

THE COURT (Jessel, M.R., Kelly, C.B., Mellish, L.J., and Denman, J.) had no doubt that the view taken by the Queen's Bench Division was correct, and affirmed the judgment for the same reasons.

Judgment affirmed.

Solicitors for plaintiffs: *Parker & Clark.*

Solicitors for defendant: *Lumley & Lumley.*

[IN THE COURT OF APPEAL.]

1876
May 2.

BEGBIE *v.* THE PHOSPHATE SEWAGE COMPANY, LIMITED.

Action for Breach of Contract—Failure of Consideration—Money had and received—Fraud.

Defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to plaintiff for 15,000*l.* the sole and exclusive right to use and exercise the patent in B. Plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The object of plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company under the belief that, if the company bought of the plaintiff the right sold to him by defendants, the company would be entitled to the exclusive use of the process in B. Plaintiff sued defendants to recover the 15,000*l.* on the ground that, as there was no exclusive right to the use of the process in B, the consideration had failed :—

Held (affirming the judgment of the Queen's Bench), that no action could be maintained, 1, on the ground that, although defendants ostensibly sold the exclusive right to use the process at B., yet plaintiff's object being to float a company, and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and he had in fact obtained that for which he had paid the 15,000*l.*; 2, on the ground that plaintiff being aware that no exclusive right to use the process in B. could be obtained, had entered into a contract with defendants in contemplation of a fraud upon the shareholders of the intended company.

APPEAL from the decision of the Court of Queen's Bench in favour of the defendants. (1)

The facts are sufficiently stated in the head-note.

Butt, Q.C., and *Trevelyan*, for the plaintiff, admitted that, if the view of the facts taken by the Court of Queen's Bench was correct, they could scarcely argue that the judgment was not right; but they contended that the facts admitted of a more favourable construction as far as the plaintiff himself was concerned.

After a minute review of the evidence in detail as given at the trial, without calling upon

Sir H. James, Q.C., and *Cohen, Q.C.*, for the defendants,

(1) Law Rep. 10 Q. B. 491.

1876

BEGBIE v. PHOSPHATE SEWAGE CO.

THE COURT (Jessel, M.R., Kelly, C.B., Mellish, L.J., and Denman, J.), came to the same conclusion of fact as the Court of Queen's Bench, and affirmed the judgment on both grounds.

Judgment affirmed.

Solicitors for plaintiff: *Combe & Wainwright.*
Solicitor for defendants: *John Holmes.*

Feb. 8; *May* 3.

[IN THE COURT OF APPEAL.]

THE VESTRY OF MILE END *v.* THE GUARDIANS OF WHITECHAPEL UNION.

Metropolis Local Management Acts, 18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *s.* 77—*Paving New Street—Liability where Street paved through Half its Breadth.*

By the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street, under the compulsory powers of the former Act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter Act the expression "new street" is to include a part of any such street.

Buildings and land belonging to the defendants abutted upon a new street which the vestry directed to be paved over half its breadth only; the part paved being that nearest the defendants' premises. The vestry apportioned the whole cost of the paving upon the houses forming the defendants' side of the street, omitting those on the other side:—

Held, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged.

STATEMENT of claim, that plaintiffs, under the statutes in that behalf, deemed it necessary and expedient that the eastern side of a new street which was not paved to their satisfaction, should be so paved, and thereupon duly and according to the statutes resolved that the same be paved by them throughout the whole length thereof for a uniform breadth of twelve feet measured from the eastern boundary thereof, and that the owners of the houses forming the eastern side of such street should be required to pay to the plaintiffs the estimated amount of the expenses of the works, such amount to be determined by the surveyor of the plaintiffs, and when so determined to be apportioned amongst

1876

VESTRY OF MILE END v. WHITECHAPEL UNION.

such owners, and the owners of the houses and the owners of the land to contribute to such estimated expenses in the same proportion, and the payment of such estimated expenses by such owners to be required, and, if necessary, enforced, before the commencement, during the progress, or on the completion of the works. That in December, 1874, the surveyor of the plaintiffs estimated the expenses of the works at 243*l.* 17*s.* 9*d.* That on the 23rd the plaintiffs apportioned the estimated expenses amongst the owners of the houses and land bounding or abutting on the eastern side of the street as follows:—On the premises known as the workhouse, belonging to the defendants, including the frontage of the private road belonging to them, 209*l.* 7*s.* 7*d.* On the house 616, Mile End Road, and the yard adjoining, 34*l.* 10*s.* 2*d.* That the plaintiffs afterwards caused the work to be done, and the actual expenses amounted to 210*l.* 17*s.* 4*d.* That defendants at the time aforesaid were, and still are, the owners of the workhouse and premises, being buildings and land abutting upon and bounding the eastern side of the new street, and benefited by the works, and the amount to be contributed by them towards the expenses in respect thereof was 181*l.* 0*s.* 3*d.* Breach, non-payment on demand of this sum.

Statement of defence. That, at the time of the resolutions in the statement of claim mentioned and of the doing of the work, there were, and still are, on the western side of the street, houses and land bounding and abutting thereon, the owners of which were and are by law liable to contribute to the expenses of the work. That the plaintiffs have not apportioned the expenses of the work among the owners of the houses and land bounding and abutting upon the street paved by the plaintiffs as in the statement of claim mentioned, but have by the resolutions attempted illegally to throw upon the owners of houses and land bounding and abutting on the eastern side of the street the whole of the expenses of the work; and that the defendants accordingly refused payment of the amount assessed upon them.

Reply. That plaintiffs deemed it necessary and expedient that part only of the street should be paved, viz., the eastern side thereof, and did not deem it necessary or expedient that the western side of the street should be paved, and did not pave it;

1876

VESTRY OF MILE END v. WHITECHAPEL UNION.

and that the houses and lands bounding and abutting on the western side of the street, and mentioned in the statement of defence, did not, nor did any or either of them, or any part thereof, bound or abut on any part of the street which the plaintiffs deemed it necessary and expedient to pave, and which they paved, as mentioned in the statement of claim.

Demurrer to the reply, and joinder in demurrer.

Finlay, in support of the demurrer. The reply is bad. The plaintiffs have, under the Metropolis Local Management Acts (1), no power to throw the expense of paving part of a street upon the owners of land and houses adjoining one side of the street only. Both sides of the street are benefited by the paving, and it is unjust to charge the expense upon one side exclusively. [He was then stopped by the Court.]

Bazalgette, for the plaintiffs. The plaintiffs were entitled to charge the owners of land and houses abutting on part of a street

(1) By 18 & 19 Vict. c. 120, s. 105, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate or made, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board, &c.)."

By 25 & 26 Vict. c. 102, s. 77, "where any vestry or district board shall, under the powers given by 18 & 19 Vict. c. 120, s. 105, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion."

By s. 112, "the expression, 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street."

with the expense of paving such part of it. In *Whitchurch* v. *Fulham* (1), a case upon the construction of these Acts, Cockburn, C.J., says: "The board may make an order that a certain street shall be paved, or they may make an order that a certain part of a street shall be paved, but, whatever order they make, they must follow it out in their apportionment of the expenses, and apportion them among the owners of the whole of the property in and abutting upon the street or part of a street mentioned in the order."

[FIELD, J. The statute does not say abut on the part paved, but on the street.

BLACKBURN, J. The other side of the street derives benefit from the paving.]

In the case of a highway with houses on one side only, the owners of these houses might exclusively bear the cost of paving their side, and years afterwards, if the defendants are right, be called on to join the occupiers of new houses opposite in paying for the pavement of that side of the street.

[BLACKBURN, J. Such a street would scarcely be a new street within the Act.

LUSH, J. In *Whitchurch* v. *Fulham* (1) the street was divided in lengths.]

There is no reason why a street should not be divided longitudinally as well as transversely.

BLACKBURN, J. I think the defendants are entitled to judgment, and that the case cited has no bearing upon the point raised. The words of the Act are not capable of the construction which the vestry seek to put on them. What they mean is that the vestry may pave a street for such part of the breadth as they think fit, but that the cost of so doing must be apportioned on the owners of the houses forming the street, or of the land bounding or abutting upon it, which means and includes both sides of the street. There must be judgment for the defendants.

LUSH and FIELD, JJ., concurred.

Judgment for the defendants.

(1) Law Rep. 1 Q. B. 233.

1876

VESTRY OF MILE END v. WHITECHAPEL UNION.

On appeal,

May 3. *Philbrick, Q.C.* (with him *Bazalgette*), for the plaintiffs, urged the same arguments as in the Court below, citing *Whitchurch* v. *Fulham*. (1)

Finlay, for the defendants, was not called upon.

JESSEL, M.R. By the definition the words "new street" include any part of such street; and by s. 105 the vestry may pave the same street, either throughout the whole breadth or any part of such breadth, and the owners of the houses "forming such street" shall pay the expenses to be apportioned upon them by the vestry. The question is a very simple one. If the vestry direct the paving throughout the whole length, or part of the length, of a street, on both sides, cutting it transversely, there can be no doubt that the owners of the "houses forming the street," that is, the houses on both sides, are to contribute. But if the vestry do not choose to pave throughout the whole breadth, the question is, are not they still bound to divide the expenses among the owners of the houses forming the street? What are the houses forming the street, if there are houses on both sides? Surely the houses on both sides. It is argued that houses may be said to form the street, although only on one side; that might be so under the first Act, and the second Act introduced the owners of land to meet the case where there were not houses on both sides. So that, whether the street be paved throughout the whole breadth, or only a longitudinal section be paved, still, the owners of the houses forming the street and of the land abutting on the street are the persons who are to contribute. The judgment of the Queen's Bench Division must be affirmed.

KELLY, C.B., MELLISH, L.J., and DENMAN, J., concurred.

Judgment affirmed.

Solicitor for plaintiffs: *Millner Jutsum.*
Solicitors for defendants: *Turner & Son.*

(1) Law Rep. 1 Q. B. 233.

GATENBY AND OTHERS *v.* MORGAN AND OTHERS. 1876

May 5.

Devise of Land before the Wills Act to nine Persons, "to be equally divided among them"—Devise in Fee with executory Devise over for Life.

A testator, by will of April, 1811, devised certain hereditaments to his granddaughter E. C. and her heirs. But if E. C. died without leaving lawful issue living at her death, the testator devised the hereditaments "unto and to the use of the nine children of J. A., to be equally divided among them share and share alike." And he devised all the residue of his estate to his son P. C.

E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C.:—

Held, 1st, that the executory devise over to the children of J. A., being before the Wills Act, created in them a tenancy in common for life only; and, 2ndly, that this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, and that subject to the life estates the property remained in E. C. and her heirs.

STATEMENT OF CLAIM: Paul Cook, late of Whitby, in the county of York, duly executed his last will, dated the 5th of April, 1811, and thereby devised unto his wife, so long as she remained his widow and unmarried, a dwelling-house, with the gardens and appurtenances (then in the testator's occupation), situate in Flowergate, in Whitby, and devised all his messuages, farms, land, and hereditaments called Mortar Pits, and from and immediately after his said wife's decease, the above-mentioned dwelling-house, with the gardens and appurtenances, unto and to the use of his son Paul Cook and his heirs. But if it so happened that his son Paul Cook departed this life without leaving any issue lawfully begotten at his death living, then and in that case, from and immediately after his said son's decease, the testator devised the said Mortar Pits and the said dwelling-house, with the gardens and appurtenances, unto and to the use of his granddaughter Eleanor Cook and her heirs. But if it so happened that his said granddaughter departed this life without leaving any issue lawfully begotten at her death living, then and in that case, immediately after his said granddaughter's decease, the testator devised the said Mortar Pits and the said dwelling-house, with the gardens and appurtenances, unto and to the use of the nine children then living of his son-in-law John Atkinson to be equally divided among them share and share alike. And the testator devised and gave all the rest, residue,

1876

GATENBY v. MORGAN.

and remainder of his estate and effects whatsoever, after payment of his just debts and funeral and testamentary expenses, unto his son Paul Cook.

The testator died on the 20th of July, 1811, being at the time of his death seised in fee of the dwelling-house, with the gardens and appurtenances, and of the Mortar Pits.

Isabella Cook remained the widow of the testator and unmarried until her death on the 1st of November, 1825.

Paul Cook, the son of the testator, died on the 10th of February, 1834, without leaving any issue lawfully begotten at his death living. He duly executed his will, dated the 21st of April, 1831, and devised all his real and personal estate to the use of his wife Emma Cook, her heirs, executors, administrators, and assigns.

Emma Cook duly executed her will, dated the 17th of August, 1849, and devised the Mortar Pits and the dwelling-house, with the gardens and appurtenances, to the use of the plaintiff Catherine Cook Gatenby, her heirs, executors, administrators, and assigns absolutely; and died on the 30th of March, 1852.

The testator's granddaughter Eleanor Cook intermarried with Edward Ridley, and died, without leaving any issue lawfully begotten at her death living, on the 30th of September, 1868.

Eight of the nine children of the testator's son-in-law John Atkinson died before Eleanor Cook (or Ridley). Some of them left issue.

The ninth child, Sarah Atkinson, died without issue on the 1st of May, 1872.

The plaintiff Catherine Cook Gatenby claims possession of the Mortar Pits and the dwelling-house, with the gardens and appurtenances, as the devisee of Emma Cook.

The other five plaintiffs are the respective heirs-at-law of the nine children, and claim possession of the premises under the devise to the nine children of John Atkinson in the will of the first testator Paul Cook.

Demurrer, on the ground that the statement of claim shews no title in any of the plaintiffs. Joinder.

Manisty, Q.C. (with him *Forbes*), in support of the demurrer. The plaintiffs shew no title. First, as to the five plaintiffs who

claim as the respective heirs of the nine children of John Atkinson. The devise to these children, being before the Wills Act, and containing no words of inheritance, created a tenancy in common for life only. The testator uses words of limitation in the previous devises, but in the devise over he omits them; this shews he intended an estate for life only: *Roe* v. *Holmes.* (1)

[*Herschell, Q.C.*, for the plaintiffs, intimated that he should rely on *Oates* v. *Brydon* (2) on this point.

LUSH, J. That is an anomalous case. In 2 Powell on Devises, 3rd ed., p. 379, it is said: "The authority of this case has been expressly denied: see *Goodtitle* v. *Edmonds* (3), and is virtually overruled by a great multitude of decisions." Lord Kenyon in *Goodtitle* v. *Edmonds* (3) gives Lord Mansfield's reasons for the decision, which cannot be supported.]

Secondly, the plaintiff Catherine Cook Gatenby claims through Emma Cook, and she under the will of Paul Cook, who was the heir and residuary devisee under the will of the original testator, Paul Cook; but Paul Cook, the son, had no interest in the hereditaments in question. The devise in fee to Eleanor Cook was only cut down pro tanto by the executory devise to Atkinson's children for life. And on the death of the last tenant for life the hereditaments became vested in possession in the representative of Eleanor Cook. The rule is thus laid down in 1 Jarman on Wills, pp. 823–827 (3rd ed.), namely, that the estate originally devised in fee or in tail is affected, by an executory devise for life, only to the extent necessary for the introduction of the life interest, and subject thereto remains in the prior devisee: citing *Hanbury* v. *Cockerell* (4) and *Jackson* v. *Noble.* (5) Again, in 2 Jarman on Wills, p. 252 (3rd ed.), this precise case is put: "If lands are devised to A. and his heirs, and in the event of his dying under the age of twenty-one and without issue, to B., B. will take an estate for life only. Indeed the seeming absurdity that a testator should mean to defeat an estate in fee for the purpose of substituting a mere life interest (which would be the gist of the argument for expanding the second devise to a fee simple), is wholly avoided by holding

(1) 2 Wils. 80.
(2) 3 Burr. 1895.
(3) 7 T. R. 635, 640.
(4) 1 Roll. Abr. 835–836.
(5) 2 Keen, 590.

1876

GATENBY v. MORGAN.

that the second devise defeats the first pro tanto only, which appears to be the sound construction." [He also cited *Watkins* v. *Watson*. (1)]

Beresford (with him *Herschell, Q.C.*), for the plaintiffs. On the first point, *Oates* v. *Brydon* (2) is precisely in point; the decision proceeded on the ground that the words used here, "to be divided among them," shewed that it was the intention that the devisees should take the whole estate, and not a mere life interest.

[FIELD, J. *Dickins* v. *Marshal* (3) is directly to the contrary on the same form of words.

BLACKBURN, J. *Oates* v. *Brydon* (2) is contrary to the whole current of authorities.]

On the second point there is no direct decision. *Hanbury* v. *Cockerell* (4) only decided that the executory devise for life was good, but decided nothing as to who had the ultimate remainder or reversion. In *Jackson* v. *Noble* (5) the events on which the executory devise was to take effect could never happen, and it was decided that the person taking under the devise in fee on which the executory devise was attached took an absolute fee simple. Here the executory devise did take effect, for one of Atkinson's children survived Eleanor Cook, who died without leaving issue. The authority of text writers on the subject is not uniform. Fearne (6) lays it down "that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue." Either, therefore, the devise over to the children of Atkinson gave them a life estate only, in which case the reversion was in Paul Cook, the son, and through him in the plaintiff Catherine Cook Gatenby; or else it gave them the fee, and then the other plaintiffs are entitled.

Manisty, Q.C., was not heard in reply.

BLACKBURN, J. When the facts are understood, it seems pretty clear on the authorities that the plaintiffs have not shewn any title in any of them under the will of the testator. The will was made in 1811, and at that time it had been well established that the heir-at-law was not to be disinherited without a manifest intention

(1) 3 D. J. & S. 434; 32 L. J. (Ch.) 609.
(2) 3 Burr. 1895.
(3) Cro. Eliz. 330.
(4) 1 Roll. Abr. 835-836.
(5) 2 Keen, 590.
(6) 1 C. R. p. 252.

on the part of the testator. Accordingly, unless there were words of inheritance, or words manifesting an intention that the devisee should take the whole estate, the devisee was held to take only a life estate, although in the majority of cases such a construction probably defeated the real intention of the testator. And accordingly, by the New Wills Act, the rule was reversed, and the contrary construction is to prevail—the devisee takes the inheritance, unless there is something to shew the contrary intention.

In the present case the will was before the Wills Act, and it must be decided by the old rule. There being no words of inheritance, is there anything to shew an intention that the devisees should take more than a life estate in the words of this devise, "unto the use of the nine children of my son-in-law John Atkinson, to be equally divided among them, share and share alike"? I do not think there is according to the authorities. There is one case, *Oates* v. *Brydon* (1), which seems an authority to the contrary, and which seems to have proceeded on the assumption that, if property is "to be divided" amongst the devisees, that is sufficient to shew an intention to give them the whole estate; and, at all events, Lord Mansfield held that it shewed an intention that the property should be sold, and the whole proceeds divided among the devisees. But I do not think the principle satisfactory; and moreover, in *Goodtitle* v. *Edmonds* (2), Lord Kenyon said the case was immediately disapproved of, and explains that Lord Mansfield proceeded on the ground of the smallness of the property, and did not adhere to his decision in subsequent cases. Consequently, on the authorities, the nine children of Atkinson took only life estates, leaving the fee in someone else after the termination of the life estates.

That brings me to the question whether the remaining plaintiff Catherine Cook Gatenby has made out a title. She claims as devisee of Emma Cook, who was devisee of all the estate of Paul Cook, and he was devisee of the residue of the estate under the will of the original testator, and also his heir-at-law. What was the effect of the different clauses in the will as to this property? The testator devised it in fee to his son Paul Cook, but with an executory devise over that, if Paul Cook died without issue living

(1) 3 Burr. 1895. (2) 7 T. R. 635.

1876

GATENBY v. MORGAN.

at his death, then the property should go to the testator's granddaughter Eleanor Cook and her heirs; and then there is a further executory devise over, in the event of Eleanor Cook dying without issue living at her death, to the use of the nine children of Atkinson, "to be equally divided among them, share and share alike." This, as I have already said, gives them only an estate for life; and the question is whether, there being one of those children living at the death of Eleanor Cook without issue, the estate of Eleanor Cook wholly ceased, and on the death of the last of the tenants for life, the reversion of the estate passed to Paul Cook as heir-at-law or devisee of the residue; or whether the remainder of the estate reverted to the heirs of Eleanor Cook, under the devise in fee to her, this estate being only so far defeated as to let in the life estate. I am of opinion that the latter is the true construction.

In *Jackson* v. *Noble* (1) there was a similar devise of an equitable fee to the testator's daughter, who became Mrs. Noble, with (precisely as here) an executory devise over, which became impossible to take effect owing to the death of the devisees in the lifetime of Mrs. Noble, and Lord Langdale, M.R., held that Mrs. Noble took the absolute fee simple. That is not precisely this case; because here one of the children who had a life interest survived Eleanor Cook. But can this make any difference? The estate devised to Eleanor Cook was in fee, and at her death was not divested, but survived to her heirs, with the existing devise over, still only a devise for life, interposed, and taking place on the event of her death without issue. In 2 Powell on Devises, 3rd ed. by Jarman, p. 240, it is said: "Where an estate is limited in derogation of a preceding estate, and to a partial though not total exclusion of the same,—as where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso that if either of his sons should die before marriage or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive,—it was held that the sons took the fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, one of them having attained twenty-

(1) 2 Keen, 590.

one and died unmarried, the survivor was entitled to his moiety for life": citing *Hanbury* v. *Cockerell.* (1) Then the author points out that, "Mr. Preston" (a high authority) "considers that the executory devise did not wholly defeat the original devise to the sons, but only introduced the limitation to the surviving son of an estate for life by way of exception out of the preceding estate in fee. To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it; for the books do not furnish a single example of its application." He then proceeds to point out that the point did not arise in *Hanbury* v. *Cockerell* (1) and in another case in which it might have arisen. But, surely, if the only possible objection is the want of direct authority, reason and common sense ought to be enough to decide the point. It is further pointed out in Powell on Devises, "that Mr. Fearne's position (2), 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder,' must be received with some qualification." Fearne seems to be speaking of a condition or limitation at common law, and not of an executory devise. And I can see no reason why an executory devise should on the happening of the event defeat the estate originally devised to a greater extent than the executory interest itself. There is no direct authority either for or against it; and I think we ought to act on Mr. Preston's view, supported as it seems to me by common sense and reason. That being so, Eleanor Cook and her heirs retained their interest in the remainder, and became entitled in possession after the death of the surviving tenant for life; and therefore none of the plaintiffs have made out a title; and judgment must be for the defendants.

LUSH, J. I am of the same opinion. The rule of construction before the Wills Act was, that a devise, without words of inheritance, or words clearly implying an intention to give the inheritance, passed only an estate for life. *Oates* v. *Brydon* (3) is inconsistent with this rule, no doubt, but it has been virtually overruled.

(1) 1 Roll. Abr. 835–836. (2) 1 C. R. 251, 538. (3) 3 Burr. 1895.

1876

GATENBY v. MORGAN.

Therefore the executory devise to the nine children of Atkinson gave them a life estate only. What was the effect of that executory devise upon the preceding devise in fee to Eleanor Cook? Common sense would say, just so much as the subsequent devise required and no more; that would leave the fee in Eleanor Cook's heirs, subject after her death without issue to the life estates of the children of Atkinson. The case of *Watkins* v. *Watson* (1), and more directly, *Jackson* v. *Noble* (2), supports this view. The true rule seems to be that the executory devise takes away from the previous estate in fee only so much as is necessary for the executory devise itself; and after the death of the surviving tenant for life the estate reverts to the heirs of the previous devisee in fee.

FIELD, J. I agree that judgment should be for the defendants, on the grounds stated by my learned Brothers.

Judgment for the defendants.

Solicitors for plaintiffs: *Shum, Crossman, & Crossman, for T. Stephenson, Whitby.*

Solicitors for defendants: *Bell, Brodrick, & Gray.*

May 9.

WAY *v.* THE GREAT EASTERN RAILWAY COMPANY.

Carrier—Carriers Act (1 *Wm.* 4, *c.* 68)—*Felony by Carriers' Servants—Evidence of Service—Estoppel.*

To an action for the loss of pictures delivered by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants.

The pictures were loaded in a van in the defendants' yard ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M. who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The Court having power to draw inferences of fact:—

Held, that the defendants were not estopped from denying that the thief was their servant.

DECLARATION against the defendants for the loss of three

(1) 3 D. J. & S. 434; 32 L. J. (Ch.) 609. (2) 2 Keen, 590.

pictures delivered by the plaintiff to the defendants to be carried for him.

Plea, that the value was not declared, &c., under the Carriers Act.

Replication, that the loss arose from the felonious acts of the defendants' servant. Issue joined.

The following are the material parts of a case stated by consent:—The three pictures had been packed in wooden cases. The value of the pictures was not declared, their value has been agreed at 1000*l.* Had this value been declared at the time of their delivery to the defendants the charge for carriage would have been 50*l.* 2*s.* 11*d.*, instead of 2*s.* 11*d.*, the charge actually made. In such a case it is the invariable practice for a policeman to travel with the goods over the defendants' line, and see them delivered to the London, Chatham, and Dover Railway Company.

The defendants carried the pictures by their railway to their goods station in London, known as the Brick Lane station, where, besides the servants of the company, persons having or professing to have business with the company have access. There the defendants loaded the pictures on one of their vans, No. 418, together with some other goods, for the purpose of being conveyed to the London, Chatham, and Dover Railway.

At the time the defendants received the pictures the course of business adopted by them in transmitting goods from the Brick Lane station to other railway stations, was as follows: They loaded the goods in their vans or in those of Messrs. Macnamara, who carry for the defendants, or in those of persons employed by Messrs. Macnamara, the vans standing in the Brick Lane station for that purpose. It was the duty of one of the clerks of the department, to which the carmen would be referred, to deliver to the defendants' carmen or the carmen of Messrs. Macnamara, or of their sub-contractors, the delivery sheets for and weight notes of the goods on the respective vans, and also passes to enable them to pass the porter at the gate of the yard, whose duty was not to permit any van to leave the yard without the production of such a pass. Before, however, a carman could obtain from such clerk the delivery sheets, weight notes, and pass, he had to go to an office called the cartage office, where he received verbal instruc-

1876

WAY v. GREAT EASTERN RAILWAY CO.

tions as to what numbered van he could take, what its destination was, and to what department he should apply for delivery sheet, weight note, and pass.

On applying to the clerk of such department, and stating the number and destination of the van, and the person by whom he was employed, the clerk would give him the delivery sheets, weight note, and pass, although he did not know him, on the assumption that he was a carman employed by defendants or Macnamara, or his sub-contractors. No man had a right to act as carman and receive the above documents unless appointed by the defendants, or Macnamara, or his sub-contractors.

On the 18th of December, 1873, while the van 418 was standing in the defendants' yard at Brick Lane station ready loaded, a man applied to William King, the defendants' delivery clerk, and stated that his name was Clarke, and that he was one of Messrs. Macnamara's carmen, and asked for a van, giving the No. 418, and stating its destination; and he thereupon received from King the delivery sheet and weight note, and a pass, which enabled him to leave the yard, the clerk assuming and believing, from the fact of his telling him the number of the van and its destination and that he was in the employ of Macnamara, that he was in fact in Macnamara's employ.

The man who called himself Clarke, having procured the documents, got on to the van No. 418 and drove it out of the yard, after having delivered his pass to the porter at the gate. The clerks in the cartage office gave evidence that, to the best of their belief, nobody representing himself as Clarke had applied for a van on the day in question, and that certainly no one had been authorized at the cartage office on that day to take away van 418.

The defendants had not a carman of the name of Clarke, but in December, 1873, Messrs. Macnamara had a man of that name. It is admitted that the felony was committed, not by him, but by the man who represented himself to be Clarke. The van 418, it was afterwards discovered, had been left empty in the Whitechapel coal yard belonging to the defendants.

It is agreed that the Court shall have power to draw all necessary inferences from the facts stated.

1876

WAY v. GREAT EASTERN RAILWAY CO.

The question for the opinion of the Court is whether the defendants are liable on the above facts for the loss of the pictures.

H. Tindal Atkinson (*Philbrick, Q.C.*, with him), for the plaintiff. It is immaterial whether the man was the servant of Macnamara or of the defendants, for in the former case he would be the defendants' servant within the Carriers Act: *Machu* v. *London & South Western Ry. Co.* (1) In that case Pollock, C.B., was prepared to hold, if it had been necessary, that the defendants, having held out and trusted the person guilty of the felony as their servant, were estopped from denying that he was their servant.

[BLACKBURN, J. What is there here to amount to an estoppel?]

The defendants intrusted the pictures to the man as their servant.

[BLACKBURN, J. No, they never intrusted them to him at all. There may have been negligence, perhaps gross negligence, but that is all.]

The defendants trusted him as the servant of Macnamara, and therefore as their servant.

[BLACKBURN, J. They did not trust him as servant, King thought he was their servant. That is all.]

The defendants had, de facto, possession of the pictures as carriers, and if they intrust the pictures to a person to act in relation to them as their servant, as against the owner they cannot deny that he was their servant, inasmuch as they put him in the position of a servant, and so enabled him to commit the felony. The very object of this part of the Carriers Act was to render the carrier liable, if he committed the dominion of the thing to another to be carried. And it is immaterial that the person turns out to be not really servant, if he has been trusted by the carrier as his servant.

Day, Q.C. (*Marriott*, with him), for the defendants, was not heard.

BLACKBURN, J. It is impossible, on any fair construction of the Act, with reference to the facts, to hold the defendants liable. It is impossible to say that the defendants have so acted as to

(1) 2 Ex. 415; 17 L. J. (Ex.) 271.

1876

WAY v. GREAT EASTERN RAILWAY CO.

represent that the thief was their servant, so as to estop them from denying it. This is a highly artificial attempt to make out a constructive liability on the part of the railway company.

QUAIN, J. You cannot turn a person, who, by false representations that he is the servant of the defendants' agent, has got from them possession of goods, into the defendants' servant for the purpose of the Carriers Act.

Judgment for the defendants.

Solicitors for plaintiff: *Paterson, Snow, & Burney, for Gipp & Sons, Chelmsford.*

Solicitor for defendants: *W. H. Shaw.*

May 11.

IN THE MATTER OF GRAY AND THE NORTH EASTERN RAILWAY COMPANY.

Lands Clauses Consolidation Acts, 1845 (18 *Vict. c.* 18), *ss*, 23, 34—*Compensation for Land to be taken—Arbitration—Costs of Arbitration—"Sum offered."*

A company was empowered to take land for their undertaking and gave to the owner notice to treat under 8 Vict. c. 18, and he gave notice, under s. 23, of his desire to have the compensation settled by arbitration, naming his arbitrator, and the company named their arbitrator. The arbitrators appointed an umpire, and on two occasions enlarged the time for making their award. The company after this made an offer which was not accepted; and the arbitration proceeded. The umpire having awarded a less sum than that offered:—

Held, that the offer was too late, and that the claimant was entitled to costs under s. 34.

Fitzhardinge v. *Gloucester Canal Co.* (Law Rep. 7 Q. B. 776) carried out.

MOTION for a rule calling on one of the masters of this Division to shew cause why a writ of mandamus should not issue commanding him to tax the claimant his costs of an arbitration, under the Lands Clauses Consolidation Acts, 8 Vict. c. 18, s. 34, and 32 & 33 Vict. c. 18, s. 1. (1)

Post 697.

(1) 8 Vict. c. 18, s. 34: "All the costs of any such arbitration and incident thereto" [to be settled by a master of the superior courts: 32 & 33 Vict. c. 18, s. 1] "shall be borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters, in which case each party shall bear his own costs incident to the arbitration," &c.

1876

GRAY v. NORTH EASTERN RAILWAY CO.

The North Eastern Railway Company having power to take for the purposes of one of their railways lands belonging to John Squire Gray, on the 12th of July, 1871, served him with a notice to treat. On the 25th of November they served the claimant with notice of their intention to summon a jury, and offered 315*l.* for the land. On the 5th of December the claimant gave notice that he desired to proceed by arbitration, that he claimed 900*l.*, and that he appointed A. B. (naming him) his arbitrator. On the 12th of December the company appointed their arbitrator, and gave notice to the claimant. On the 23rd of December the arbitrators appointed an umpire, and enlarged the time for making the award to the 1st of March, 1872.

On the 10th of December the company applied to the Board of Trade to appoint a valuer under 8 Vict. c. 18, s. 85. On the 23rd of January, 1872, the valuer surveyed the premises; and on the 17th of February, reported the value to be 472*l.* 16*s.* 10*d.*; the company, however, did not pay that sum into the Bank of England, nor take any steps towards getting possession of the land.

On the 28th of February the arbitrators further enlarged the time for the award to the 12th of March, and about the same time (the 28th of February) the company verbally offered 472*l.* 16*s.* 10*d.* to the claimant; and on the 1st of March his solicitors assented to the offer, provided any costs already incurred were paid by the company in addition. On the 13th of March a written offer of 472*l.* 16*s.* 10*d.* was made by the company and refused. The time for making the award having in the meantime been enlarged, the arbitration proceeded, and the umpire made an award of 447*l.* 5*s.*

On an application to the master to tax the claimant his costs, the master, being doubtful whether the claimant was entitled to costs, refused to tax, in order that an application might be made to the Court to decide the question.

A. Wills, Q.C., in support of the motion. The claimant is entitled to costs under s. 34 of 8 Vict. c. 18. (1) The sum awarded is larger than the original offer of the company, and the second offer was too late. It ought to have been made at latest on the

(1) Ante, p. 696, n.

1876

GRAY v. NORTH EASTERN RAILWAY CO.

appointment of the company's arbitrator, when the arbitration properly began; after that, before the offer was made, costs had been incurred,—whether large or small is immaterial: *Fitzhardinge* v. *Gloucester Canal Co.* (1) really decides this case.

The Court then called upon

Cave, Q.C., and *Willis*, who appeared to shew cause in the first instance. The offer of 472*l.* was in time. No time is mentioned in s. 34. All that *Fitzhardinge* v. *Gloucester Canal Co.* (1) decided was, that an offer made when the company's arbitrator was named was in time; but it did not decide that an offer after that would be too late. *Pearson* v. *Great Northern Ry. Co.* (2), given in a note to that case, has no bearing on this case, because that was an assessment by a jury, and s. 38 explicitly requires the offer to be made before the company summon the jury, which had not been done. In *Metropolitan Ry. Co.* v. *Turnham* (3), which was followed in *Hayward* v. *Metropolitan Ry. Co.* (4), it was held that, where the proceedings were by jury under s. 68, which does not mention any time for making an offer, the "sum previously offered" in s. 51 must have been offered a reasonable time before the trial. So by analogy, in the case of arbitration, the offer would be in time if made a reasonable time before the actual commencement of the arbitration. And here the offer of 472*l.* was made in ample time before the actual commencement of the arbitration. All that had been done before was the appointment of an umpire and the enlargement of the time, mere formal matters.

BLACKBURN, J. I am of opinion that this rule should be made absolute. Possibly the legislature might have done better if they had enacted that the promoters up to the time of actually going before the arbitrators might do what would be equivalent to paying money into court, that is, offer a sum to the claimant, who might take it in full satisfaction or without prejudice to proceeding by arbitration to get more, and then the costs would have depended on whether he got more or not. But the legislature have not so enacted. They have said after the offer the claimant may go on,

(1) Law Rep. 7 Q. B. 776.
(2) Law Rep. 7 Q. B. 785, n.
(3) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.
(4) 4 B. & S. 787; 33 L. J. (Q.B.) 73.

1876

GRAY v. NORTH EASTERN RAILWAY CO.

and the claimant's right to costs is to depend upon whether the sum awarded exceeds the sum offered. Section 68 (of 8 Vict. c. 18), regulates the proceedings by arbitration in certain cases, but it has no application to this case; it is s. 34 that regulates the right to costs, and on which the present question depends. By that section "all the costs of such arbitration, and incident thereto, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters, in which case each party shall bear his own costs." Now when must this sum have been offered? The only time for an offer mentioned in the Act is, that the promoters are to state what sum they are willing to give in their notice of intention to summon a jury (s. 38). But we decided in *Fitzhardinge* v. *Gloucester Canal Co.* (1) that, though the company had made such an offer, yet when the claimant gave notice of his election to proceed by arbitration, the company might make a further offer at any time before the arbitrators were actually appointed. In that case the claimant gave notice of his wish to proceed by arbitration, and the company were the first to appoint an arbitrator, and they gave notice to the claimant of the appointment, and at the same time made an enlarged offer. The Court decided that the offer, having been made before the arbitrators were appointed, and therefore before any costs could have been incurred in the arbitration, was in time. It was unnecessary for us to decide that no subsequent offer could be made in time, but the whole reasoning of the Court points to this, that no subsequent offer would have been in time; and I think we must say that the final offer which is to bind the company and the claimant's right to costs, must be made before the arbitration commences, that is, when the arbitrators are appointed, and when costs may be incurred. It is immaterial whether costs have or have not been incurred, or whether they are large or small, the rule must be the same in all cases. I therefore am of opinion that the offer of 472*l.* in this case was too late; and that the claimant's costs ought to be taxed. The rule, therefore, will be absolute.

QUAIN, J. I am of the same opinion. It is necessary to lay

(1) Law Rep. 7 Q. B. 776.

1876

GRAY v. NORTH EASTERN RAILWAY CO.

down some general rule, and I think that the offer must be made in all cases before the particular litigation substantially begins; and in the case of arbitration this must be when the arbitrators are appointed, and before the arbitrators can be said properly to have seisin of the case. The rule proposed by Mr. Cave that the offer ought to be in time, if made before any expenses had been incurred, is too vague. I think we are clearly following out the spirit of the decision in *Fitzhardinge* v. *Gloucester Canal Co.* (1), by saying that the offer must be made before the arbitration can be said to have begun, that is, on the appointment of the arbitrators.

Rule absolute.

Solicitors for claimant: *Le Riche & Son, for Wavell, Foster, & Wavell, Halifax.*

Solicitors for company: *Jacobs & Vincent, for North & Sons, Leeds.*

May 25.

LEE *v.* GASKELL.

Statute of Frauds (29 *Car.* 2, *c.* 3), *ss.* 4, 17—*Sale of Tenant's Fixtures.*

The tenant of premises having become bankrupt, the trustee sold the tenant's fixtures on the premises to the plaintiff, and he sold them to the defendant, the landlord. There was no agreement in writing, and the value of the fixtures was above 10*l.* An action having been brought for the price:—

Held, that the sale was not within s. 4 of the Statute of Frauds as the sale of an interest in land, nor within s. 17 as the sale of goods and chattels; and the action was therefore maintainable.

Hallen v. *Runder* (1 C. M. & R. 266) followed.

STATEMENT of claim, inter alia, that plaintiff sold to defendant a gas-meter and certain gas-fittings then in a certain mill. The plaintiff furnished defendant with a bill for the meter and fittings, amounting to 11*l.* 18*s.* 8*d.*, which the defendant promised to pay, but has not paid.

Statement of defence: Defendant denies the sale as alleged and that he received the bill and promised to pay it as alleged. That there was no note or memorandum of the bargain in writing signed by the defendant or his agent, nor did he accept part of the goods

(1) Law Rep. 7 Q. B. 776.

and actually receive the same, nor did he give anything as earnest money or as part payment, within 29 Car. 2, c. 3, s. 17.

At the trial before Brett, J., at the Manchester spring assizes, it appeared, as to this part of the plaintiff's claim, that the defendant was landlord of the mill in which the fixtures were, they were tenant's fixtures, and the tenant had become bankrupt, and the trustee sold them to the plaintiff, and he afterwards sold them to the defendant for the sum claimed. It was objected that the contract came within either s. 4 or s. 17 of the Statute of Frauds; and the learned judge directed judgment for the defendant, giving leave to move to enter judgment for the plaintiff.

J. Edwards, Q.C., for the plaintiff, moved accordingly. This was not a contract within either section of the Statute of Frauds. *Hallen* v. *Runder* (1) is directly in point that such a contract is neither an agreement for the sale of an interest in land within s. 4, nor an agreement for the sale of goods and chattels within s. 17. This case is recognised as good law in the notes to *Greene* v. *Cole.* (2)

H. Collins (with him *C. Russell, Q.C.*), for the defendant. It must be admitted that *Hallen* v. *Runder* (1) is an authority that such a contract is not one relating to an interest in land within s. 4; but there is no decision that s. 17 did not apply, and it may be observed that possession had been taken by the landlord, who was the purchaser in that case. Here the sale was not by the tenant direct to the landlord, but from the tenant or his trustee to the plaintiff, and by him to the landlord.

[COCKBURN, C.J. Is it more than the sale of the right to sever? the fixtures had not been severed.]

Bayley, B., in *Hallen* v. *Runder* (3), says: "It [the sale] effects a severance when the purchase is complete, but not before." The purchase here was complete as between the trustee and the plaintiff, and the fixtures therefore had become chattels by the original sale, before they were resold to the defendant.

[QUAIN, J. They had not in fact been severed when the plaintiff sold to the landlord; what have we to do with any original sale?]

(1) 1 C. M. & R. 266. (2) 2 Notes Saund. 656.
(3) 1 C. M. & R. at p. 269.

1876

LEE v. GASKELL.

The plaintiff has no title except by that sale. The question is treated as doubtful in Amos and Ferard on Fixtures, p. 252–4, where *Parker* v. *Staniland* (1) is cited, in which it was held that the sale of a growing crop of potatoes was a contract, not within s. 4, but within s. 17. *Smith* v. *Surman* (2) is to the same effect; and the case of fixtures is very analogous to that of growing crops, as is pointed out by Parke, B., in *Hallen* v. *Runder*. (3)

COCKBURN, C.J. The case of *Hallen* v. *Runder* (4) is directly in point and binding upon us, and I think the principle on which it was decided was perfectly right. Fixtures, although they may be removeable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term. There is but a remote analogy between fixtures and growing crops, but there is this obvious distinction between them,—fixtures, when sold as fixtures, are intended to remain where they are, while, as to growing crops, it is the express intention of the purchaser to remove them.

MELLOR and QUAIN, JJ., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *E. Milne & Co.*

Solicitors for defendant: *Pritchard & Englefield, for Grundy & Kershaw, Manchester.*

(1) 11 East, 362.
(2) 9 B. & C. 561.
(3) 1 C. M. & R. at p. 275.
(4) 1 C. M. & R. 266.

THE QUEEN *v.* THE INHABITANTS OF GREENHOW.

1876
May 10.

Highway—Indictment for Non-repair—Landslip covering Part of Highway —Exemption from Liability.

Upon the trial of an indictment for the non-repair of a highway, it appeared that the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, and part of the highway was carried away into the valley below, and its place filled up with earth, stones, and other débris. The débris was at one point twenty-five feet above, and at another two feet below, the level of the old road, and occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road it had been ascertained by boring that for a depth of thirty and a half feet from the surface there was nothing but soil, shale, and stones, and that there was no trace of the old metalled road, but the line of it was known and admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of 341*l.* :—

Held, the Court haivng power to draw inferences of fact, that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it.

INDICTMENT against the inhabitants of the township of Greenhow, in the North Riding of the county of York, for the non-repair of a highway. The indictment was removed by certiorari into this court, and came on to be tried before Amphlett, B., at the York spring assizes, 1875, when a verdict of guilty was found by consent, subject to the opinion of the Court, upon the following case :—

1. The defendants are the inhabitants of the township of Greenhow, one of three townships in the parish of Ingleby Greenhow. And it is admitted, for the purposes of this case, that the township of Greenhow is liable to maintain its own highways.

2. The road is a common Queen's highway, called Broughton Bank Top, leading from Stokesley to Bilsdale.

3. The indictment alleges that a part of the road in the township of Greenhow, being in length 251 yards and in breadth 6 yards, on the 1st of July, 1873, and from thence until the date of the indictment, was in great decay for want of due reparation.

4. The highway in question is an ordinary metalled road, and that part of it mentioned in paragraph 3, and now in dispute, runs north and south along the slope of a hill several hundred feet

1876

THE QUEEN v. INHABITANTS OF GREENHOW.

above the level of the valley beneath the slope, being at right angles to the direction of the road and very precipitous.

5. Up to the time of the landslip hereinafter mentioned, the road was a highway repairable by the parish or township of Ingleby Greenhow, and was, and except as hereinafter mentioned now is, in good and proper repair.

6. In April and June, 1872, two landslips of great magnitude occurred on the slope of the hill, the second being a continuation of the first, the two landslips together comprising many acres of land, and extending from the top of the slope to about 170 yards below the highway.

7. The part of the highway now in dispute and out of repair was absolutely destroyed by the landslip, that is to say, was carried away into the valley below, and its place supplied and filled up with earth, stones, and other débris of landslip.

8. A large portion of the hillside was moved bodily downwards to the valley beneath, and the ground on which the old road stood was broken up and carried away as stated.

9. The depth and level of the débris along the line of the old road differs much. The débris is at one point twenty-five feet above, and at another two feet below, the level of the old road, and now occupies the line or track of the old highway.

10. This débris consists of loose soil, stones, and shale, and there is water, coming from springs on the hillside, which percolates through and over it, and from the time of the original landslips up to the present time, in dry weather, both horses and some carts and conveyances still continue to pass over it, nearly in, but higher up the hill than the line of the old road, and of course with great danger and difficulty. In wet weather the débris is at times so full of water as to be impassable, as there are no drains.

11. At the point where the débris is twenty-five feet above the level of the old road, it has been ascertained by boring that, for a depth of thirty and a half feet from the surface, there is nothing but soil, shale, and stones, and that there is no trace of the old metalled road, but the line of it is known and admitted.

12. The metal, consisting of broken stones, of the old road has been carried away at one point fifty-five yards down the hill into the valley from its original position, and a wall which ran along

the east or lower side thereof, as a fence or boundary on that side, was carried downwards along with the road, and is visible among the débris for about fifty yards of its length.

13. At the north edge of the landslip, at the point where the same meets the uninjured portion of the highway, the site of the old road is scooped out and lowered, so that there is a fall of some few feet from the uninjured metalling to the débris on the line or track of the old road.

14. A verdict of guilty was entered, subject to the finding of an engineer, on the following three questions, namely:—1st. What had become of the old road, and whether and to what extent had it been carried away from its former position. 2nd. Whether and to what extent it had been absolutely destroyed. 3rd. Whether it was practicable, and at what cost, to make a permanent and passable road along the whole track of a similar character to the adjoining parts of the old road; and it was ordered that upon such finding a special case might be stated at the request of either party.

15. The engineer having viewed and inspected the locus in quo and taken such evidence and obtained such information and assistance as he thought fit, made his report on the 4th of November, 1875, and found the facts as follows:—1. The old road had been carried away and overlaid by a landslip, at a point called Broughton Bank Top, to an extent of 252 yards or thereabouts. 2. The road is absolutely destroyed for the extent to which it is carried away and overlaid, amounting in the whole to the said length of 252 yards. 3. It is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and the cost of doing so would be 341*l.*

16. The rateable value of the whole parish is 4756*l.*, and a rate of 5*d.* in the pound on this amount produces 100*l.* or thereabouts.

17. There is in existence a good road from Bilsdale to Stokesley, which diverges from the destroyed road at a point on the Bilsdale side of the landslip and reaches Stokesley by way of Ingleby Greenhow, but by this road from the point of divergence the distance to and from Stokesley is increased by one mile and two-thirds of another mile, and persons using the same having also to pass through, open, and close several gates.

1876

THE QUEEN v. INHABITANTS OF GREENHOW.

18. On this road the defendant township has, since the said landslip, expended a considerable sum in improving it, so as to render it more convenient.

19. There is also a road from Bilsdale to Stokesley by way of Carlton; these roads are both of them longer in distance than the destroyed road, but the gradients are somewhat better.

20. The Court is to be at liberty to draw inferences of fact.

21. The question for the opinion of the Court is, whether there exists a legal duty or obligation upon the defendants to make and maintain an available carriage-road in the line or track of the old road, so as to form and continue a permanent and passable highway from Stokesley to Bilsdale at the part destroyed.

Wills, Q.C., and *Forbes*, for the prosecutors. There is nothing to relieve the defendants from their obligation to maintain the road for public use as a highway. The only case in which the defendants could be excused from liability is where the substance of the road has been destroyed by the act of God or some extraordinary accident. The law is clearly explained in *Reg.* v. *Hornsea* (1), where upon an indictment for non-repair it appeared that the highway ran down to the sea, the land gently sloping to the water's edge, and that by the encroachment of the waves the land and road were swept away. It was held that the obligation to repair was gone, as there was no highway to repair.

[QUAIN, J. The common law confines the obligation of the parish to repairs; it does not require them to make a road.

BLACKBURN, J. In all these cases it is very much a question of degree.]

In the present case the road along the old track could be restored at a very moderate expense. *Reg.* v. *Bamber* (2) is another case where part of the highway was encroached upon by the sea, and it was stated that it would cost a very large sum of money to make a road in place of that destroyed; but Lord Denman, while holding the parish not liable, did not rely upon the argument that the ancient line of highway had been removed, but upon the fact that it would be necessary to create the earth anew. The case of *Reg.* v. *Paul* (3), where the highway ran along the top of a quay,

(1) Dears. & P. Cr. C. 291; 23 L. J. (M.C.) 59. (2) 5 Q. B. 279.
(3) 2 Mood. & Rob. 307.

part of which was washed away by the sea, is precisely similar. There is nothing to shew that the money required for the repairs is an unreasonable sum.

Cave, Q.C., for the defendants. The question whether it is reasonably practicable for the parish, under the circumstances, to repair the road, can hardly be the test of their liability. In *Reg.* v. *Hornsea* (1) Maule, J., suggests, as the condition of liability, does the highway still exist?

[BLACKBURN, J. What is the alteration of the locus in quo which in point of law enables one to say that the road no longer exists?]

The arbitrator has found in effect that, to carry out the repairs, it will be necessary to construct a new way. It may be difficult to lay down any general rule as to what is a substantial destruction of a highway, but here there is enough to shew that the old road has been destroyed. Under the Highway Act, 27 & 28 Vict. c. 101, ss. 47, 48, the highway board may, in place of the parish, execute the necessary works.

[BLACKBURN, J. Is there any power to compel them to execute such works?]

It must be admitted that there is not.

BLACKBURN, J. In this case I have great difficulty in giving a precise definition of what constitutes a destruction of a highway, but upon the facts found by the arbitrator I have come to the conclusion that enough has not been done or happened to the road in question to relieve the parish from the liability to repair it. Whether a highway has been destroyed or not, is a question of more or less, and it is a matter of common sense that where the road has been swept away and occupied by the sea, you cannot call on the parish to repair it, or in the case of a sea wall, where the public have acquired a right to walk on the top of the wall, the parish could not be obliged to rebuild the wall if it were washed away by the sea. On the other hand, it would be equally impossible to say that, when, in consequence of a landslip or one of those floods which frequently occur in certain districts, the surface of a metalled road is filled up or covered over, the parish is

(1) Dears. & P. Cr. C. 291; 23 L. J. (M.C.) 59.

1876

THE QUEEN v. INHABITANTS OF GREENHOW.

relieved from liability. The same observations apply to the case where a quantity of gravel or débris is thrown from above on a highway, and the line of the old road remains as before.

Here we have the facts that the highway ran along the slope of a hill, that a landslip occurred, and that part of the highway was driven into the valley below, and its place supplied by earth, stones, and other rubbish. It appears that at one point this rubbish is twenty-five feet above the level of the old road, and that there is no trace of this old road, but that the line of it is known and admitted. Now, can we draw the inference that the old road has been wholly destroyed? I think, upon the facts which I have stated, I could hardly do so; but then we have the report of the surveyor that it is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and that the cost of doing so would be 341*l*. I think that, in drawing such an inference, it would always be a question of more or less, and, for my part, the operations which are described as necessary do not seem to me to involve any enormous difficulty. Therefore, in drawing my inferences of fact, I think it cannot be said that the road was annihilated, and that it was impossible, in a commercial sense, to repair it, that is, that it would cost more than the subject-matter of repair is reasonably worth.

QUAIN, J. I am of the same opinion. It is very difficult, as has already been said, to lay down any rule as to when a road must be regarded as completely destroyed. In the cases which have been referred to, the highway was not injured in the manner described in this case, but the sea occupied the site of the road itself. Now, can we say that there was here such a complete destruction of the whole road as to bring the case within these authorities. All we find is that a large part of the road was carried away into the valley below, and that the line of the whole road is covered with débris, the depth of which differs very much. The only destruction of the highway that I can find is that the metalled part of the road has been carried away from its former position, or overlaid, while the old line of the road remains as before. Looking at these facts, I cannot think that it is

possible for us to say that the road has been absolutely destroyed, so as to exempt the parish from liability to repair. The cases which have been brought before us are cases where there was a total destruction of the highway, and, for the reasons which I have given, I think that a total destruction has not been shewn, so as to relieve the defendants from their liability.

Judgment for the Crown.

Solicitors for prosecutors: *Bell, Brodrick, & Gray.*
Solicitors for defendants: *Williamson, Hill, & Co.*

LUTSCHER *v.* THE COMPTOIR D'ESCOMPTE DE PARIS.

June 20.

Consignor and Consignee—Equitable Assignment of Bills of Lading—Right to recover against third Person for Detention.

The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L., having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:—

Held, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it.

STATEMENT OF CLAIM: 1. The plaintiff is a merchant, and carries on business at 8, Austin Friars, London. 2. The defendants are bankers carrying on business at 144, Leadenhall Street, London. 3. During and since the month of April, 1875, the plaintiff has had consigned to him by Louis Levy, a merchant carrying on business at Oran, in Africa, cargoes of palm leaves and other produce upon the terms mentioned in the next paragraph. 4. In order to place Levy in funds for the purchase of the said produce, the plaintiff agreed to allow him to draw upon the plaintiff's firm. Levy was to make purchases in Africa of the said produce,

1876

LUTSCHER v. COMPTOIR D'ESCOMPTE DE PARIS.

and ship the same to the plaintiff. The plaintiff agreed to effect sales in this country of such shipments, charging a commission thereon. The documents of title of such shipments were hypothecated to the plaintiff so as to enable him to provide funds to meet the bills drawn by Levy. 5. On the 27th of May, 1875, the plaintiff, at the request of Levy, and in pursuance of the said agreement set out in the fourth paragraph, contracted with the Tovil Paper Company, Limited, carrying on business at Maidstone, in Kent, to sell to them 250 tons of palm leaves at 3*l.* per ton, free on board in Oran, payment to be by acceptance of the buyers at three months on delivery of the bill of lading. The cargo to be shipped by vessel chartered by the buyers, to arrive at Oran aforesaid not later than the 31st of October, 1875. 6. Levy having drawn upon the plaintiff in pursuance of the said agreement set out in the fourth paragraph, was enabled to purchase, and did in fact purchase, 250 tons of palm leaves, and the same were shipped on board the steamship *Sydenham*, chartered by the said Tovil Paper Company, Limited, the loading of the cargo being entirely completed on the 22nd of October, 1875. 7. The bill of lading was, on the 22nd of October, 1875, duly signed and handed by the captain of the steamship *Sydenham* to Levy, and the plaintiff alleges that the same should have been transmitted to the plaintiff by Levy in order to put the plaintiff in funds to meet drafts of Levy upon the plaintiff under the agreement aforesaid. 8. Upon the 23rd of October, 1875, Levy stopped payment, and his affairs were placed in liquidation. The liquidator having obtained possession of the bill of lading, instructed the Bank of Algiers to transmit it to their correspondents in London, who are the defendants, with directions not to part with the same until they were paid the sum of 538*l.* 4*s.* 2*d.*, the alleged value of the cargo of 250 tons of palm leaves. 9. Upon the 4th of November, 1875, the plaintiff having paid the drafts of Levy to a large amount, which amount is still due to the plaintiff, applied to the defendants for the bill of lading, but was informed of the instructions they had received. The plaintiff claimed the bill of lading under his agreement with Levy, but the defendants refused to part with the same unless they were paid the sum of 538*l.* 4*s.* 2*d.* 10. The plaintiff, on the 8th of November, 1875, under protest, paid to the defendants the sum of

538*l.* 4*s.* 2*d.*, and obtained the bill of lading. Averment, that the defendants improperly withheld from the plaintiff the bill of lading to which the plaintiff was entitled under the agreement with Levy.

The statement concluded by claiming the payment of the 538*l.* 4*s.* 2*d.* so paid with interest, and damages for the detention of the bill of lading.

Demurrer and joinder in demurrer.

Holl, in support of the demurrer. The statement of claim does not shew such a title in the plaintiff to the bill of lading, or such a wrongful detention of it by the defendants from him as entitles him to recover back the money paid to obtain possession of the document. There was no hypothecation of the document by Levy so as to pass the property in it to the plaintiff. The mere breach of an agreement on the part of Levy, assuming that it applied to the cargo in question, which is not alleged, gave no title to the plaintiff, after Levy's affairs were placed in liquidation, to have the bill of lading delivered up to him without payment of the value of the cargo. In *Chinnock* v. *Sainsbury* (1), where the owner of a collection of pictures agreed to deposit it with auctioneers in consideration of an advance of money from them, and further agreed that the amount of the advance should be deducted from the proceeds of the sale, but afterwards refused to deposit the whole of his collection with them, a bill for specific performance of the agreement was dismissed.

Benjamin, Q.C., for the plaintiff. The statement of claim shews an equitable title in the plaintiff to the bill of lading, and that the assignee of Levy took it subject to its previous hypothecation to the plaintiff; and the defendants, as agents of the assignee, can have no better title. In Fisher on Mortgages, vol. i., 2nd ed., p. 128, it is said: "An agent who has advanced money or incurred liability on account of his principal is protected by a lien on the property in respect of which the advances were made, or on the produce of the sale of it." In *Bristow* v. *Whitmore* (2), where the master of a ship entered into a charterparty to carry troops, and stipulated on his own responsibility to make certain alterations in

(1) 6 Jur. (N.S.) 1318.

(2) 9 H. L. C. 391; 31 L. J. (Ch.) 467.

1876

LUTSCHER v. COMPTOIR D'ESCOMPTE DE PARIS.

the ship to enable him to carry troops, and made the alterations, and paid money and drew bills to meet the expenses, it was held, the shipowner having adopted the charterparty, that the master was entitled to be repaid out of the freight the money which he had advanced. And in *Dean* v. *Byrnes* (1), where there was an agreement that the lender of money should be employed to sell sugar expected to arrive, and that he should be repaid out of the proceeds of the sugar, it was held that he had no lien upon the proceeds of sugar which was afterwards shipped to the representatives of the borrower; but this decision was expressly upon the ground that the sugar was not purchased with the money lent. Here the cargo was purchased by means of the advance, and there was a full and complete contract that the bill of lading should come to the hands of the plaintiff, and it was hypothecated to him by the very nature of the transaction.

Holl, in reply. In the present case there was no agreement with regard to the particular parcel of palm-leaves in respect of which the bill of lading was given. There was nothing but a general agreement that the plaintiff should have a lien on goods to be shipped to him by Levy.

COCKBURN, C.J. I should be very sorry if I were obliged to decide in favour of the defendants. The facts appear to be that, before the cargo of palm-leaves was shipped, there was a specific engagement between the plaintiff and Levy, the consignor, that the goods should be bought with money advanced by the plaintiff, and that the bill of lading should be forwarded to the plaintiff as a security for his advance; and as far as we can see, if Levy had not become bankrupt, the bill of lading would have been forwarded to the plaintiff in due course. Under these circumstances I cannot entertain a shadow of doubt that a court of equity would decree specific performance of Levy's agreement. It is further to be observed that this is not a case in which the rights of third parties intervene. Inasmuch, therefore, as it is no longer any objection in this Court that the plaintiff's rights are equitable only, I think it is quite clear that he is entitled to judgment.

MELLOR, J. I am of the same opinion. Whether the money

(1) 3 Moo. P. C. (N.S.) 92; 13 W. R. 299.

1876

LUTSCHER v. COMPTOIR D'ESCOMPTE DE PARIS.

was directly advanced for the purchase of this particular cargo or not, it seems clear that these goods were bought and shipped under an arrangement that the plaintiff should be paid his advances out of the proceeds of the sale of these goods in England. It was, therefore, the duty of Levy or his representatives to send the bill of lading to the plaintiff, and to no other person. What happened was, in fact, equivalent to a valid hypothecation of the bill of lading. I think we ought to carry out the original intention of the parties by enabling the plaintiff to recover possession of a document which ought to have been forwarded to him.

FIELD, J. I am of the same opinion, though I have not been without doubt during the argument, not as to the principles upon which the case ought to be decided, but from the manner in which the facts are stated. If I had thought it clear that the goods were shipped upon the terms that they, or what represents them, the bill of lading, should stand as a security for the advances, I should have had no difficulty. But my doubt has been whether such an agreement is clearly stated upon the record. As, however, there are issues of fact upon the pleadings, and an agreement for an equitable pledge must be proved at the trial, or if it is not proved the plaintiff cannot succeed, this doubt is of less importance; and upon the argument of the demurrer, I cannot hold that the claim is a bad one.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. G. Ditton.*
Solicitors for defendants: *Lyne & Holman.*

1876
May 26.

THOMAS *v.* BROWN.

Statute of Frauds — Vendor and Purchaser — Memorandum of Agreement — Description of contracting Party as "Vendor" — Deposit, when recoverable — Acquiescence.

The plaintiff signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars and conditions; and the auctioneer signed "as agent for the vendor." The plaintiff paid a deposit, and the vendor's solicitor forwarded to the plaintiff's solicitors an abstract of title, and in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, &c." And after examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." The plaintiff subsequently repudiated the contract, on the ground (inter alia), that the contract did not disclose the name of the vendor, and brought an action to recover the deposit:—

Held, without deciding whether the memorandum was insufficient under the Statute of Frauds, that the plaintiff could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit and receive the abstract of title; and that the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.

Sale v. *Lambert* (Law Rep. 18 Eq. 1) and *Potter* v. *Duffield* (Law Rep. 18 Eq. 4), discussed.

Casson v. *Roberts* (31 Beav. 613; 32 L. J. (Ch.) 105) questioned.

INTERPLEADER ISSUE obtained in an action brought by the plaintiff against Croucher, an auctioneer, to recover a deposit.

The following case was stated for the opinion of the Court:—

1. The defendant, previously to the 10th of May, 1875, had advertised a leasehold shop and premises at Hornsey Rise, Middlesex, to be sold by auction by E. E. Croucher, an auctioneer, at the Mart in the city of London, on the 10th of May, 1875, under printed particulars and conditions of sale. Previous to the day of sale the plaintiff was in communication with the auctioneer as to the purchase of the premises, and received from him the particulars and conditions. In the particulars the property was described as "held under a lease dated the 5th of December, 1856, for an unexpired term of 80¼ years, and as leased to Mr. Miles, a draper, for the term of 21 years from the 26th of March, 1871."

1876

THOMAS v. BROWN.

The following conditions of sale are material:—

"Sixth. The said lease and the counterpart of the under-lease will be produced at the sale, and may be inspected at the office aforesaid during three days previous to the day of sale, and no objection shall be taken to any matter contained in or omitted from the same lease or underlease. The production of the receipt for the rent last due shall be taken as conclusive evidence of the performance of insurance, and all other leases and covenants, in respect of the lot, up to the day of completing the purchase, whether the purchaser shall or shall not have had notice of any breach of any particular covenant, and the purchaser shall not object that any instrument is unstamped, or not sufficiently stamped, or to the non-registration of any deed or document in Middlesex, and no evidence of identity shall be required."

"Ninth. If any mistake be made in the description of the property, or any other error shall appear in the particulars of sale, such mistake or error (if capable of compensation) shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require; such compensation in case of dispute to be settled by arbitration in the usual way."

"Lastly. If the purchaser shall fail to comply with any of the above conditions, his deposit money shall be forfeited to the vendor, who shall be at liberty (with or without notice) to resell the premises by public auction or private contract, without the necessity of previously tendering an assignment to the defaulter, and such new sale or sales may be made at such time or times, and subject to such conditions and in such manner in all respects, as the vendor shall think proper. And if on or after such resale there shall be any loss to the vendor, either by reason of a deficiency of price, or by reason of costs, charges, or expenses incurred by him, or both, the purchaser shall make good such loss to the vendor, as and for liquidated damages, and on any such resale by auction the premises offered for sale may be bought in, and all expenses of and attending an unsuccessful attempt to sell may immediately thereupon be recovered from the defaulter."

2. On the 10th of May, 1875, the plaintiff did not attend the sale at the mart, but she afterwards signed the following contract,

1876

THOMAS v. BROWN.

which was partly printed and partly in writing, on the back of one of the printed particulars and conditions of sale :—

"Memorandum.

"I, the undersigned Hannah Thomas, of 3, Peter's Lane, West Smithfield, do hereby acknowledge that I have this day purchased the property described in the within particulars, subject to the foregoing conditions of sale, at the price of seven hundred pounds, and that I have paid into the hands of the auctioneer the sum of seventy pounds as a deposit and in part payment of the said purchase-money; and I hereby agree with the vendor to pay the remainder of the said purchase-money to complete the purchase according to the within conditions of sale.

"As witness my hand the 10th day of May, 1875.

"(Signed) H. Thomas."

	£	s.	d.
Purchase-money . . .	700	0	0
Deposit-money paid . . .	70	0	0
Remaining to be paid . .	630	0	0

"As agent for the vendor I ratify this sale, and as auctioneer acknowledge the receipt of the deposit.

"Witness, A. N. Stuttard. Edwd. E. Croucher."

3. On or about the 15th of May, 1875, the following letter, and the abstract therein referred to, were received by Messrs. Keen & Rogers, the plaintiff's solicitors:—

"Herewith I send abstract of title. The deeds may be examined at my office at any time you may appoint.

"Jno. Fraser."

4. In reply Messrs. Keen & Rogers wrote :—

"15th May, 1875.

"Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next at 2 o'clock to examine abstract of title, with deeds, on behalf of Mrs. Thomas."

5. From the abstract of title, it for the first time appeared that

the defendant was the owner of the property the subject-matter of the contract of the 10th of May, 1875.

6. Messrs. Keen & Rogers having examined the abstract with the title deeds, on the 21st of May, 1875, wrote to the defendant's solicitor:—

"We forward you herewith a few requisitions on the title and shall be glad to receive your replies at your early convenience."

Accompanying, and at the foot of the requisitions above-mentioned, was a note as follows:—

"The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises."

7. On the 22nd of May, 1875, the defendant's solicitor wrote to the plaintiff's solicitors, "Herewith I return requisitions with answers."

8. On the 2nd of July the defendant's solicitor wrote to the plaintiff's solicitors:

"Please let me have draft assignment at your early convenience."

And on the 9th of July the defendant's solicitor wrote to the plaintiff's solicitors as follows:—

"Brown and Thomas,—I have just been informed by Mr. Croucher that your client does not intend to complete her purchase, please let me know whether my information is correct; if it is I shall immediately instruct counsel to draw bill for specific performance."

9. The plaintiff's solicitors repudiated the contract of the 10th of May, 1875, and on the 23rd of July commenced an action against Croucher for the recovery of the 70*l.* which had been paid to him by the plaintiff on the signing of the contract.

10. The defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the above contract, and no question has been raised on the answers to the requisitions, but one of the grounds of the repudiation was that the contract of the 10th of May, 1875, did not disclose the name of the vendor.

1876

THOMAS v. BROWN.

The questions for the opinion of the Court are, 1. Whether the contract of the 10th of May, 1875, is a valid contract. If the Court shall be of opinion in the affirmative, the judgment is to be entered for the defendant. 2. If the Court shall be of opinion in the negative, the second question is whether the plaintiff is entitled to recover back the deposit paid under the above circumstances.

May 20. *Fullarton* (*Holl* with him), for the plaintiff. The plaintiff is entitled to recover back the deposit, for it was paid upon an invalid contract. The memorandum signed by the plaintiff does not disclose one of the contracting parties, the vendor, either by name or description. It is only signed by the auctioneer as "agent for the vendor." Two recent decisions by the Master of the Rolls, *Sale* v. *Lambert* (1) and *Potter* v. *Duffield* (2), bear closely upon this point. In the first of these cases the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on the particulars was signed by the auctioneer "on behalf of the vendor." It was held that the vendor was sufficiently described, and the memorandum sufficient. But in the second case, where the particulars did not disclose the vendor's name, and the auctioneer wrote at the foot of the memorandum, "confirmed on behalf of the vendor," it was held that the memorandum was insufficient, as the term "vendor" was not of itself a sufficient description of one of the contracting parties.

[MELLOR, J. How does it lie in the mouth of the plaintiff to take this objection after she has accepted the abstract of title?]

The plaintiff has done nothing which deprives her of the right to contend that the Statute of Frauds has not been complied with. In *Commins* v. *Scott* (3) the Master of the Rolls followed his decision in *Potter* v. *Duffield* (2), saying that the Court ought to be careful not to manufacture descriptions or to be astute to discover descriptions which a jury could not identify. The fact that the contract has been in part executed is no answer to the objection: *Cocking* v. *Ward*. (4)

(1) Law Rep. 18 Eq. 1.
(2) Law Rep. 18 Eq. 4.
(3) Law Rep. 20 Eq. 11.
(4) 1 C. B. 858.

1876

THOMAS v. BROWN.

J. Thompson (*Salter*, *Q.C.*, with him), for the defendant. The plaintiff cannot recover back the deposit. In Chitty on Contracts, 10th ed., p. 581, it is said, citing *Sweet* v. *Lee* (1), that the mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money to recover the same as on a failure of consideration.

[MELLOR, J. It seems very hard that the purchaser should get back his deposit without being liable for the expenses. The deposit is a security for the performance of the contract.]

In *Ex parte Barrell* (2), it is laid down by the Lords Justices that, where the purchaser refuses to perform the contract, he cannot get back the deposit: *Hood* v. *Lord Barrington* (3), and Dart's Vendors and Purchasers, 5th ed., p. 218, support the decision of the Master of the Rolls in *Sale* v. *Lambert*. (4) In *Depree* v. *Bedborough* (5), where the assignees in bankruptcy of the purchaser elected not to complete the purchase, it was held that the deposit was forfeited, though the conditions of sale contained no express provision as to forfeiture. This case is distinguishable from *Casson* v. *Roberts* (6); where it was held that the purchaser was entitled to a return of the deposit, for there there was no agreement which could be enforced either at law or in equity.

Fullarton, in reply. First, the description "vendor" is not enough to identify the defendant. Secondly, with regard to the cases as to failure of consideration. *Depree* v. *Bedborough* (5), was a case where there was a perfectly good contract, which the purchaser failed to complete. *Carson* v. *Roberts* (6) is in point for the plaintiff, for there the reason why the deposit was held recoverable was that there was only a verbal contract.

Cur. adv. vult.

May 26. The following judgments were delivered :—

MELLOR, J. This is an interpleader issue to try the plaintiff's right to recover 70*l.* paid by her as a deposit on the purchase of

(1) 3 M. & G. 452.
(2) Law Rep. 10 Ch. 512.
(3) Law Rep. 6 Eq. 218.
(4) Law Rep. 18 Eq. 1.
(5) 4 Giff. 479; 33 L. J. (Ch.) 134.
(6) 31 Beav. 613; 32 L. J. (Ch.) 105.

1876

THOMAS v. BROWN.

some leasehold property. The facts are stated in a case for the opinion of the Court. [The learned judge stated the principal facts, and proceeded.] The two questions for our consideration are, first, whether the contract was a valid contract, and, secondly, if it was not, whether the plaintiff is, under the circumstances, entitled to recover back the deposit. I am of opinion that our judgment ought to be for the defendant. Several cases have been decided on the point now raised, particularly two cases which came before the Master of the Rolls: *Sale* v. *Lambert* (1) and *Potter* v. *Duffield.* (2) In the first of these cases a memorandum of agreement was held to be sufficient within the Statute of Frauds, though the vendor was not described otherwise than as "the proprietor" of the premises, the Master of the Rolls saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one, *Potter* v. *Duffield* (2), where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that, in neither of the cases was this requirement complied with. To allow so general a description to satisfy the statute seems to me to lead to all the mischief which it was intended to prevent, and I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parol evidence. However, it is unnecessary to consider whether these cases were or were not rightly decided, for I think that the defendant is entitled to our judgment on two grounds. The main object of the interpleader issue is to ascertain whether the 70*l.* belongs to one or other of the two parties, and the case in Beavan's Reports, *Casson* v. *Roberts* (3), where it was held that a contract under similar circumstances

(1) Law Rep. 18 Eq. 1.
(2) Law Rep. 18 Eq. 4.
(3) 31 Beav. 613; 32 L. J. (Ch.) 105.

could not be enforced, is, I think distinguishable, in spite of some strong expressions of Lord Romilly. Here, there are two answers to the claim to have the money paid back to the vendee. First, on the face of these conditions of sale it is obvious that the plaintiff paid the deposit knowing at the time that the name of the defendant did not appear on the memorandum of agreement otherwise than as "the vendor." She voluntarily paid the 70*l.*, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description as sufficient. Under these circumstances, I think she cannot recover back the money.

Secondly, under the fourth condition of sale (1) "the vendor shall, within seven days from the day of sale, deliver to the purchaser or his solicitor an abstract of title to the property purchased by him, subject to the stipulations contained in the conditions. And the purchaser shall, within seven days from the delivery of the abstract, deliver to the vendor's solicitor a statement in writing of his objections and requisitions (if any) to or on the title as shewn by such abstract, and upon the expiration of such last-mentioned time the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions (if any), and time shall be deemed to be as of the essence of this condition, as well in equity as at law." Now, what did the plaintiff do? If she had intended to insist on her right to rescind the contract on the ground that the memorandum was insufficient, it was her duty to send back the abstract, saying, "Why do you send this to me?" She, however, does not send it back, but keeps it, and her solicitors write this letter: "Dear sirs,—Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next, at two o'clock, to examine abstract of title with deeds, on behalf of Mrs. Thomas."

Now I cannot conceive anything more unlikely than that a solicitor would allow his client's title-deeds to be examined while there was a doubt as to the validity of the contract of sale. But the plaintiff's solicitors proceed to examine the abstract, and learn from it the name of the vendor. Then they keep the abstract in their possession, as if the only question which could arise was as to the title,

(1) This condition was not set out in this case, but a copy of the conditions was by consent referred to during the argument.

1876

THOMAS v. BROWN.

and write a letter inclosing requisitions as to the title, putting at the foot of the requisitions the words "The above requisitions are made without prejudice to any question that may arise as to the contract for the purchase of the premises." I take the word "objection" to mean any unforeseen objection to the title which the plaintiff's solicitors did not wish to be taken to have waived. The requisitions are returned with answers, the correspondence goes on, and finally, on the 9th of July, the defendant's solicitor writes that he has been informed that the plaintiff does not intend to complete her purchase and that if this be true he shall take proceedings. To this the plaintiff's solicitors reply repudiating the contract.

Now I feel no doubt that the case comes within the rule laid down in *Cornish* v. *Abington* (1), that, "if any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." I think this is an express authority which quite justifies us in holding that it does not lie in the mouth of the vendee, who has accepted a contract like this, afterwards to object to it. For this reason I think we cannot say that the contract is invalid.

Then there is a second answer. In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts—in ignorance of facts which, if they had been known, would have left the plaintiff an option whether she would pay or not. The rule is laid down by Patteson, J., in *Duke of Cadaval* v. *Collins* (2), that money paid under compulsion of law cannot be recovered back as money had and received; and, further, "where there is bona fides and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts. Now, is there anything unconscientious in the defendant keeping this money? I can see nothing. The breaking

(1) 4 H. & N. 549; 28 L. J. (Ex.) 262. (2) 4 A. & E. 858.

off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, "Although I can have the contract performed if I please, I repudiate it." Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim.

QUAIN, J. I am of the same opinion. I do not propose to discuss the cases which have been cited; I will merely say that I have great difficulty in reconciling the two decisions of the Master of the Rolls. But I decide this cause on the ground that it is an action by an unwilling vendee against a willing vendor, and that it cannot be said that the consideration has failed so as to entitle the plaintiff to recover. By the 10th paragraph of the case it appears that the defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for. Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money. Secondly, we must consider the peculiar position of the parties as disclosed by the correspondence. It appears that after the purchaser received the abstract the solicitors examined it with the deeds and made requisitions. These were acts which assumed that a contract existed, and yet the plaintiff now proposes to take proceedings upon the footing that there was no contract at all. It will, no doubt, be said that every thing was done "without prejudice to any question which might arise as to the contract of purchase," and that this reservation having been assented to, the defendant is bound by it. But, in my opinion, the words "without prejudice to any question which may arise" mean any question in the execution of the contract, and not any question as to the existence of the contract. I think that no solicitor would understand the plaintiff as reserving any question as to the existence of the contract. Under such circumstances the plaintiff is not entitled to recover the

1876

THOMAS v. BROWN.

deposit. With regard to the case of *Casson* v. *Roberts* (1), I do not think that it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory.

Judgment for the defendant.

Solicitors for plaintiff: *Keen & Rogers.*
Solicitor for defendant: *John Fraser.*

July 25.

RE E. D. LEWIS. EX PARTE MUNRO.

Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28, *ss.* 4, 8, 9)—*Agreement between Solicitor and Client—Receipt containing Terms of Agreement, but signed by Solicitor only—Taxation.*

13 C.L.D. 191
299

A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client, but signed by the solicitor only, is not an "agreement in writing" within the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, and the solicitor may be required to deliver a detailed bill of costs, to be taxed in the ordinary way.

SUMMONS taken out at Chambers, calling on E. D. Lewis, solicitor, to shew cause why the alleged agreement for costs of defence in the case of *Reg.* v. *A. Munro, Jun.*, should not be declared null, and not an agreement in writing within the provisions of the Attorneys and Solicitors Act, 1870, Part I. (2), or (if the alleged

S. Jun. N.S. 1179

(1) 31 Beav. 613; 32 L. J. (Ch.) 105.

(2) By the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, "an attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by salary, or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a Court or a judge to be taken thereon by motion or petition,

agreement were a valid agreement in writing within the statute) why it should not be set aside as not being fair and reasonable, or why the taxing master should not be directed to ascertain how much was due in respect of the work, if any, done by Lewis under the alleged agreement up to the time of his ceasing to be solicitor for the defendant, according to the provisions of s. 14 of the Act, or why the alleged agreement should not be re-opened and the costs, fees, charges, and disbursements of Lewis in respect of the matter to which it purported to relate should not be taxed, and he be directed to pay and return the whole of the money or securities received by him in connection with the said matters, or such part as the judge at the hearing of the summons might think fit, together with the costs of the application, &c.

---

and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled, and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

By s. 8, "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made by the Court in which the business or any part thereof was done."

By s. 9, "Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge, by rule or order, in such manner, and subject to such conditions, if any, as to the costs of such motion or petition, as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner, and according to the same rules, as if such agreement had not been made."

By s. 15, "Except as in this part of this Act provided, the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act, shall not be subject to any taxation nor to the provisions of the Act of the 6th and 7th Vict. c. 73, and the Acts amending the same, respecting the signing and delivery of the bill of an attorney or solicitor."

1876

RE LEWIS. EX PARTE MUNRO.

The summons was heard before Lindley, J., who referred the matter to the Court.

The facts as disclosed by the affidavits were that A. Munro, Jun., having been arrested on a charge of forgery, instructed Lewis to defend him before the magistrate at the Marlborough Street Police Court. Subsequently Mrs. Munro, the mother of the prisoner, handed Lewis 400*l.*, and received from him the following receipt:—"Queen *v.* Andrew Munro. Mrs. Munro has this day handed me a draft upon Messrs. Barnett, Hoares, & Co., for 400*l.* It is agreed that the entire costs of this defence, including special counsel, shall be 300*l.* (Signed) Edward Lewis." Mrs. Munro in her affidavit said that she did not read the receipt, but Lewis distinctly stated that he read the receipt to her. Munro was committed for trial, but before the day fixed for the trial he wrote to Lewis dispensing with his services, on the ground that he had neglected the defence, and instructed another solicitor. After the trial Lewis claimed to retain 300*l.* out of the 400*l.*, as being due to him for costs, charges, and disbursements under the agreement.

Manisty, Q.C. (*Moulton* with him), in support of the rule, was stopped.

Willis shewed cause, and contended, first, that the receipt was an agreement in writing within 33 & 34 Vict. c. 28, s. 4; secondly, that the Act 6 & 7 Vict. c. 73, did not authorize the taxation of bills of costs in proceedings before magistrates, and further that the agreement was, under the circumstances, a reasonably fair one and had been duly performed.

LORD COLERIDGE, C.J. There is no foundation for the objection that a bill for costs in proceedings before magistrates is not subject to taxation by the Court, and it appears that the master of the Crown Office has frequently taxed such bills. It is unnecessary to express any opinion as to what was the real understanding between the parties, as it is quite clear that there was no agreement in writing within s. 4 of the Act, and therefore s. 15, which excludes agreements within the Act from the operation of 6 & 7 Vict. c. 73, does not apply. An "agreement in writing" within s. 4 must be an agreement by both parties, and

both parties must sign their names upon the agreement. One reason for holding this to be the construction of the section is that otherwise it would always be possible for a solicitor to place a document signed by himself only and containing terms favourable to him before a client, and then to contend that the client was bound by it. The solicitor would, of course, take the risk of having the document enforced against him, which he would know was not a likely contingency. But a sufficient reason for the construction is that the legislature evidently intended to prevent as far as possible any discussion like this which has just taken place as to what was really understood by either party.

QUAIN, J., concurred.

Rule absolute that the solicitor deliver a detailed bill of costs within ten days; the bill to be taxed in the ordinary way. The 300l., after deducting the amount of the taxed costs, to be repaid to the client.

Solicitor for applicant: *W. Webb.*
Solicitor for defendant: *E. D. Lewis, in person.*

THE METROPOLITAN BOARD OF WORKS *v.* THE NEW RIVER COMPANY.

June 1.

Practice—Order to have Point of Law decided before Issues of Fact—Order XXXIV., Rule 2.

A judge has power, under Order XXXIV., Rule 2, after writ and before statement of claim, to order a point of law to be decided before the issue of fact is tried.

Where, therefore, the writ of summons was indorsed "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter under s. 41 of the New River Act, 1852," and after appearance the plaintiffs, on an affidavit, uncontradicted by the defendants, that the sole question between the parties was whether the defendants were bound under s. 41 to supply water by meter for road use, obtained an order under the above rule:—

Held, that the order was rightly made.

Affirmed 2 C.B.D. 67.

IN this case the writ of summons was indorsed "The plaintiffs claim damages from the defendants for refusing to supply them

(1) See [illegible]

1876

METROPOLITAN BOARD OF WORKS v NEW RIVER CO.

with water by meter in accordance with the provisions of s. 41 of the New River Company's Act of 1852, and a mandamus."

The defendants having appeared, application was made on behalf of the plaintiffs to Amphlett, B., at chambers, under Order XXXIV., Rule 2 (1), on an affidavit which stated that, by letter of the 9th of February, 1876, the plaintiffs refused to renew their old agreement with the defendants for the supply of water for watering the Victoria Embankment for the ensuing season, and desired to be supplied by meter, under s. 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), to which the defendants replied by letter of the 13th of March, that they could not consent to supply the plaintiffs with water for road use by meter under s. 41: that there are no facts in dispute, and the only question is one of law, whether the defendants are bound under s. 41 to supply the plaintiffs for the purposes aforesaid by meter, and that such question will most conveniently be raised for the decision of the Court by the statement of a case.

The defendants filed no affidavit in reply; but contended that the judge had no jurisdiction, under Order XXXIV., Rule 2, to make the order before statement of claim.

The judge made an order that the question in this action be stated in the form of a special case for the decision of the Court.

A. E. Hardy moved to rescind this order. The question of law must appear on the pleadings; "otherwise" must mean this; it would be necessarily inconvenient to try on affidavit whether a preliminary question of law does or does not arise.

Biron shewed cause. There is here no dispute as to what the question of law in the case is. It is clear that under the rule the question need not be raised by the pleadings; and if there is juris-

(1) Order XXXIV., Rule 2: "If it appear to the Court or judge, either from the statement of claim or defence, or reply, or otherwise, that there is a question of law which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

diction to make the order before any pleadings, this is precisely the case in which it ought to be made.

BLACKBURN, J. This is a peculiarly clear and simple case, and I think the order of Amphlett, B., perfectly right. It appears that the plaintiffs applied to the defendants to supply them with water by meter for the purpose of watering the Victoria Embankment. The defendants replied, We are not bound by our Act to supply by meter for road purposes, but only for domestic purposes. This is the short and simple question between the parties, which turns upon the construction of this Act of Parliament, and the decision of that question will probably render all further litigation unnecessary; at any rate it is most convenient that that question of law should be decided before any evidence is given; and provided he is satisfied of this, Order XXXIV., Rule 2, gives power to a judge to stay the proceedings in order to raise the question on a special case; and it was a most proper exercise of discretion on the part of the learned judge, if he had the power to make the order at this stage of the proceedings, viz. after appearance and before statement of claim. But Mr. Hardy contends that, "if it appear to the Court or judge, either from the statement of claim, or defence or reply, or otherwise," does not extend to affidavit, but must mean, appear from the pleadings; and I agree that in many cases it would be very inexpedient, as a general rule, to enter into preliminary questions on affidavit; but I do not think there is any such objection in such an exceptional case as the present, where it is very clear upon what the dispute turns. But Mr. Hardy argues that it cannot be done at all under this rule. I do not agree with that. And if there is the power to make the order before claim and defence, this is certainly a case in which it ought to be exercised.

QUAIN, J. I am of the same opinion. I think that Rule 1 throws light upon the second rule. Rule 1 says the parties may after writ of summons concur in stating the questions of law for the opinion of the Court in a special case; that is, on the real facts, and not on the pleader's version of them. Then Rule 2 gives the judge power to order the same thing to be done as to a pre-

1876

METROPOLITAN BOARD OF WORKS v. NEW RIVER CO.

liminary question of law, if it appear to him from the pleadings or "otherwise" that this would be convenient. "Otherwise" gives the judge jurisdiction to ascertain this on affidavit; and, beyond all controversy, if there is jurisdiction, it has been well exercised in the present case.

Order affirmed with costs.

Solicitors for plaintiffs: *Solicitors to the Board.*
Solicitors for defendants: *Baxters & Co.*

June 27, 28.

THE QUEEN *v.* ASPINALL AND OTHERS.

Conspiracy—Sufficiency of Indictment—Fraudulently obtaining settling Day for Shares of new Company—Official List of Stock Exchange.

In an indictment for conspiracy, the first count stated that the undertaking called "The Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange, and that the defendants were respectively directors, secretary, and promoters of the E. Company, Limited, a new company which had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, first, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c. Secondly, that, previous to such application being submitted to the committee, production of the following documents should be required—the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. Averment, that the defendants conspired to deceive Z. and others, the committee for general purposes, and to induce them to appoint a settling day, and falsely pretended to them that the number of shares of the company applied for by the public was 34,365, and the amount received on application 17,182*l.* 10*s.*; that 15,000 of the shares of the company had been allotted to the patentee, and that no shares of the company had been conditionally allotted; whereas no shares had been applied for by the public, the greater number of the shares had been allotted to the applicants upon condition

that they should not be called on to pay for them, and whereas nothing had been received by the company upon the application for the shares; and 15,000 fully paid-up shares had not been taken by the patentee, &c.

Second count: That defendants were respectively directors, secretary, and promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of bonâ fide character, &c.; that the requirements of the second of the rules mentioned in the first count had been complied with—that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others not being counted in such two-thirds) had been applied for and unconditionally allotted to the public—and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that the defendants requested a firm of stock-brokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5000 shares of the company on behalf of alleged vendors of patents, and that the defendants conspired to deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's subjects, who should themselves buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that the defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public, &c. (repeating the false pretences mentioned in the first count), and did thereby induce the committee to order the shares to be quoted in the official list after the 28th of May, 1874.

At the trial the jury found that the defendants were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means, and a verdict of guilty was entered:—

Held, on a motion in arrest of judgment (Cockburn, C.J., doubting), that the second count was good, as it must be taken by necessary inference to allege that the object of the conspiracy was, not merely to obtain a settling day and official quotation upon the Stock Exchange, and so to induce persons to believe that the company was duly formed and constituted, but also to induce persons to act on that belief and to deal in the shares of the company:

Semble, per Cockburn, C.J., that the first count was defective, as it did not shew any conspiracy to defraud the public.

2 Q.B.D. 48. C.A.

INDICTMENT against Joseph Aspinall, William Whyte, Charles Knocker, John Saunders Muir, and two others. First count: That by a deed made and dated the 27th of March, 1802, an

1876

THE QUEEN v. ASPINALL.

undertaking was proposed to be carried on thenceforth in a building then erected near Throgmorton Street, City, for the transacting of buying and selling the public stocks or funds of this kingdom, and a capital sum of 20,000*l.* had then been subscribed for setting on foot and carrying on the said undertaking under the name of "The Stock Exchange," and was then divided into 400 shares of 50*l.* each, and nine persons were then appointed trustees and managers of the undertaking, and due provision was then made for election of trustees and managers from among the proprietors of the undertaking, to fill up vacancies, so that there should be nine such trustees and managers. And for the management and transacting the concerns of the undertaking, thirty persons had, previous to March 27, 1802, been chosen by ballot at a general meeting of the proprietors, a committee for general purposes, and due provision was then made for an annual election by ballot of thirty proprietors of "The Stock Exchange," to act for the term of one year as aforesaid, and the committee for general purposes were thenceforth empowered to have the sole management, regulation, and direction of all the concerns of the undertaking, except the treasurership thereof and the direction and management of the buildings; and were empowered to admit such persons, whether proprietors or not, as they should think proper, to attend and frequent the building called the Stock Exchange, for the transacting therein the business of a stockbroker or jobber for one year, to be computed from the 25th of March in each year, and at a price of admission fixed by the trustees and managers aforesaid. And that from and after the date of the deed and at the time of the taking the inquisition, the management, &c., of the concerns of the undertaking, except as aforesaid, had been and were carried on by the committee for general purposes of the Stock Exchange, and who had from time to time adopted rules and regulations for the conduct of business on the Stock Exchange, which were in full force and effect in respect of the members of the Stock Exchange and Stock Exchange transactions, and the committee for general purposes had full power and authority to expel any member of the Stock Exchange who violated any of the regulations so adopted, or failed to comply with any of the decisions of the committee. Averment, that heretofore J. Aspinall

and W. Whyte had been directors of a public company called The Eupion Fuel and Gas Company, Limited, and one G. P. Knocker had been the secretary and public officer of the company, and S. G. Fry, J. S. Muir, and C. Knocker had been persons aiding and assisting in the establishment of the company, and that the company had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares, for the purpose of carrying out the objects of the company, and that the company was in all respects a new company. And that all persons dealing in the shares of a new company, according to the rules, regulations, and usages of the Stock Exchange, when such new company had not yet received the appointment of a special settling day in respect of the transactions in the shares of such new company, required, for the purpose of making their contracts and bargains in respect of the shares enforceable according to the rules and regulations of the Stock Exchange, that a special settling day should be fixed by the committee for general purposes of the Stock Exchange, upon which settling day all shares which had been theretofore bought and sold should be delivered and paid for according to the rules, regulations, and usages of the Stock Exchange. And that on April 1, 1874, an application had been made by and on behalf of Aspinall, Whyte, G. P. Knocker, Fry, Muir, and C. Knocker, to the committee for general purposes of the Stock Exchange, to appoint a special settling day for transactions in the shares of the company, and thereupon it became and was necessary that the company should comply with the terms of certain rules duly issued and published by the committee, and which rules were and are as follows:—"127. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery; and that no impediment exists to the settlement of the account. 128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions in the shares of a new company previous to such application being submitted to the committee, and shall require the production of the following

1876

THE QUEEN v. ASPINALL.

documents, viz. the prospectus, the Act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost-book system under the Stannary laws; the original applications for shares, together with the allotment-book signed by the chairman and secretary to the company, and a certificate signed in like manner, stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon; the banker's pass book and a certificate from the bankers, stating the amount of deposits received." And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, knowing the premises, and contriving and intending to cheat and defraud, had on the 3rd of February, 1874, unlawfully conspired, combined, confederated, and agreed together, and with divers other persons, to the jurors unknown, by divers false pretences, &c., to injure, deceive, prejudice, and defraud S. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, and to induce them, contrary to the true intent and meaning of the rule hereinbefore recited, to appoint a special settling day on the Stock Exchange for transactions in the shares of the company. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, in pursuance of the unlawful conspiracy, &c., unlawfully and knowingly did falsely pretend to S. H. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, that the number of shares of the company applied for by the public was then 34,365, that the number of shares of the company allotted unconditionally was then 34,365, and that the amount received by the company thereon was, on application, 10*s.* per share, amounting to the sum of 17,182*l.* 10*s.*, that 15,000 of the shares of the company had then been allotted to the patentee, and that no shares of the company had been conditionally allotted, whereas in truth and in fact, the number of shares of the company applied for by the public was not then 34,365, nor any number, and whereas the number of shares allotted unconditionally was not then 34,365; but the greater part of the shares had been allotted to the applicants for the same upon the condition that they, the applicants, should not be called upon to pay for the same, and whereas the amount received by the company upon the application for the shares was not

17,182*l.* 10*s.*, nor was any amount whatever received by the company from applicants for shares, and whereas 15,000 fully paid-up shares of the company had not been taken by the patentee, &c.

Second count: That at the time of committing the offence thereinafter mentioned, Aspinall and Whyte were directors and G. P. Knocker secretary of the Eupion Fuel and Gas Company (Limited), and Fry, Muir, and C. Knocker were persons aiding and assisting in the establishment of the company, and applications had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the new company in the official list of the Stock Exchange, under and in pursuance of a rule duly issued and published by the committee, as follows: "129. The committee will order the quotation of a new company in the official list, provided that the company is of bonâ fide character and of sufficient magnitude and importance; that the requirements of rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the Act of Parliament or the articles of association, and, in the case of limited companies, contains the memorandum of association; that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed; and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid or to be paid in money or otherwise to concessionaires, owners of property, or others, on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted; that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others, not being counted in such two-thirds) have been applied for and unconditionally allotted to the public; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. In cases where fully paid-up shares have been

1876

THE QUEEN v. ASPINALL.

granted in lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the registrar of joint stock companies, as prescribed by the 25th section of the Companies Amendment Act, 1867," &c. Averment, that the defendants had applied to and requested one Sir R. W. Carden and others, a firm of stockbrokers and members of the Stock Exchange, and authorized them to give the information hereinbefore mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange, and G. P. Knocker had employed them to sell 5000 shares of the company on behalf of certain alleged vendors of patents, and they had bargained for the sale of 300 of the shares. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, did, on the 3rd of February, 1874, unlawfully conspire, combine, confederate, and agree together, and with divers other persons whose names were to the jurors unknown, by divers false pretences, &c., to injure and deceive the said members of the committee, and to induce them, contrary to the true intent and meaning of the rules in this count and in the first count of the indictment mentioned, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, and the other persons, &c., in pursuance of the unlawful conspiracy, combination, confederacy, and agreement, unlawfully and knowingly did falsely pretend to De Zoete, Fenn, and others, members of the committee, &c., that the number of shares of the company applied for by the public was then 34,365, and that the amount received by the company thereon was on application 10*s.* per share, amounting to the sum of 17,182*l.* 10*s.*; that 15,000 of the shares had then been allotted to the patentee, that no shares had been conditionally allotted; and did thereby induce the committee for general purposes

1876

THE QUEEN v. ASPINALL.

of the Stock Exchange to order the shares to be quoted in the official list of the Stock Exchange on and after the 28th of May, 1874.

At the trial before Cockburn, C.J., at the last Hilary sittings in London, it appeared that in March, 1874, the defendant, Muir, had promoted a company for the manufacture of gas from oil, called "The Eupion Fuel and Gas Company, Limited," with a capital of 50,000 shares of 1*l.* each. The defendant, C. Knocker, was cousin to G. Knocker, the secretary of the company, and he was also general manager of the Midland Banking Company. C. Knocker applied in March, 1874, to a member of the firm of Sir R. W. Carden & Co., stockbrokers, and asked him to procure a special settling day for the company on the Stock Exchange. There is a settling day each fortnight on the Stock Exchange for transactions in ordinary stocks and shares, but in the case of a new company application has to be made to the committee for a settling day, and if the documents and evidence produced on behalf of the company are considered satisfactory, a special day is appointed to settle transactions in it, after which day they are disposed of on the regular settling days. Before a special settling day is appointed, transactions in the shares of a new company cannot be enforced through the committee of the Stock Exchange. The rules of the Stock Exchange as to the documents, &c., required upon application for a settling day are stated in the first and second counts of the indictment. It was arranged that the secretary of the share and loan department of the Stock Exchange should write to the secretary of the company for the proper documents. In reply, a certificate was sent that the number of shares applied for was 34,365; that the number of shares allotted unconditionally was 34,365, and the amount received on application, 10*s.* a share, 17,182*l.* 10*s.*; that the number of shares taken by the patentee was 15,000 (fully paid up); that no shares were conditionally allotted; that the shares were ready for delivery, and no impediment existed to the settlement of the account. The pass book of the company's bankers, and the allotment papers and allotment book, were sent in support of these statements. In fact, there did not appear to have been a single bonâ fide application for shares, but a number of persons were induced by Aspinall and Whyte, who were the committee for superintending the allotment,

1876

THE QUEEN v. ASPINALL.

to write applications for shares, upon the understanding that they should not be called upon to pay for them, and the shares, as they received them, were handed back to Aspinall. In order to make it appear that the deposits on these allotments were paid, Muir obtained an advance of 3000*l.* from the Midland Banking Company, through the agency of C. Knocker, and from this sum the deposits were paid to the credit of the Eupion Gas Company at their bankers, the money being afterwards paid back to the Midland Banking Company, and the operation repeated again and again until a sum equal to the whole amount of the deposits had been paid into the bank to the credit of the Eupion Company. On the 26th of May a special settling day in the shares of the company was fixed for the 28th, and after the 28th a quotation of the shares in the official list was ordered to appear. In April G. Knocker had instructed a broker to sell a number of shares in the company, which he said were retained by the patentee. Part of these shares were sold for the special settlement, whenever it should be fixed. The name of Aspinall was given in as the vendor of certain of the shares. After the settling day had been appointed, in September, Aspinall and C. Knocker purchased, through town and country brokers, large numbers of the shares, to the amount of 19,000*l.*, and upon non-delivery claimed to make the brokers personally responsible. The defendant Muir was proved to have been seller of part of these shares. At the time of these transactions the whole of the shares of the company, with the exception of three, were in Aspinall's name.

The jury found that it had not been proved that the defendants were engaged in a combination to buy or sell shares on the Stock Exchange for the purpose of defrauding the brokers, but that Aspinall, Whyte, Muir, and C. Knocker were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means.

A verdict of guilty was entered against them on the first and second counts, with leave to move to enter the verdict for the defendants.

A rule was obtained accordingly, and also to shew cause why judgment should not be arrested, or why a new trial should not be had, on the ground that the verdict was against the evidence, and that the facts as proved, or as found by the jury, as alleged in the indictment, did not amount to an indictable conspiracy.

June 27. *Sir H. Giffard, S.G.* (*Poland* and *Besley* with him), shewed cause. It must be taken, after verdict, that the offence charged in the first and second counts was duly proved, and the question is whether either of these counts discloses an indictable offence. With regard to the first count, it shews a conspiracy to obtain a certificate or testimonial from a public body by false evidence. In *British and American Telegraph Co.* v. *Albion Bank* (1), where a settling-day was obtained under circumstances similar to these, Bramwell, B., in delivering judgment, said:— "The object was that the bank might certify to the committee of the Stock Exchange that the requisite amount of shares to get a settling-day had been applied for and paid in. . . Now, it is necessary for the purposes of our judgment and right, that it may not be supposed that our opinion is otherwise, that we should say that the scheme we have mentioned was fraudulent and illegal, and brought the parties to it within the criminal law."

[COCKBURN, C.J. There the question was whether an action could be brought, and the observations of the learned Baron were not necessary for the decision.]

It must be presumed that the conspiracy to obtain a false character was for the purpose of defrauding the public. The second count, at any rate, is not open to objection. In *Rex* v. *De Berenger* (2) it was held that it was an indictable offence to conspire by false rumours to raise the price of the public government funds with intent to injure the king's subjects who should purchase, and that the indictment need not specify the particular persons who purchased or the persons intended to be injured; Lord Ellenborough saying, "The crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect." Here it is alleged, in substance, that the intent was to have the shares quoted in the official list, and to induce those who should buy and sell the shares to believe that they were different from what they actually were.

[BLACKBURN, J. In *Rex* v. *De Berenger* (2) it was charged that the intent was to raise the price of stock. Here it is not

(1) Law Rep. 7 Ex. 119. (2) 3 M. & S. 67.

1876

THE QUEEN v. ASPINALL.

in terms alleged that the intent was to raise the value of the shares.]

The effect of the conspiracy is the same.

[COCKBURN, C.J. Is it sufficiently charged that people were induced to purchase the shares by the belief that they were worth more than they really were worth?]

This is the obvious effect of procuring the shares of the company to be quoted in the official list of the Stock Exchange.

Ballantine, *Serjt.* (*W. Ballantine* with him) for C. Knocker, *Pope*, *Q.C.*, and *Metcalfe*, *Q.C.*, for Aspinall, *A. Collins* and *Hodson*, for Whyte, and the defendant Muir in person, shewed cause. The first and second counts are bad. There is nothing to shew that the result of obtaining a settling-day is to enhance the value of the shares in the company. It can only give facilities for dealing in the shares, and if the promoters of a company, which they believe will ultimately succeed, arrange to do something in order to start it, without intending to injure any one, this is not an indictable conspiracy.

[BLACKBURN, J. Is not a conspiracy to induce buyers of shares to believe, contrary to the fact, that the capital has been duly subscribed, a criminal offence?]

It is merely alleged that the intent was to induce those who might buy or sell shares to believe that they were really subscribed for and the deposits paid.

[BLACKBURN, J. To believe this before they purchased the shares. Surely the majority of people, seeing the shares quoted in the lists, would suppose that the rules had been complied with.]

There is another object which is quite legitimate, that of obtaining the enforcement of bargains by the Stock Exchange Committee. A conspiracy to give a false character to a servant would not be indictable unless with the express object of obtaining a situation for the servant.

[FIELD, J. With what other object could a false character be obtained?]

No specific questions were put to the jury as to whether the object of the defendants in obtaining the settling-day was to defraud brokers or dealers in the shares.

[They referred to *Reg.* v. *Gill* (1); *Sydserff* v. *Reg.* (2); *Rex* v. *Seward.* (3)]

1876

THE QUEEN v. ASPINALL.

COCKBURN, C.J. I think the rule ought to be discharged, although I have entertained very considerable doubt as to the sufficiency of these counts upon which the jury have found the defendants guilty, and am still of opinion that the first count is defective, although, perhaps, it is not necessary to dwell upon it from the view we take as to the other. The first count alleges simply that the defendants entered into a conspiracy (I am stating it shortly) to induce the committee of the Stock Exchange to grant a settling-day and a quotation of the shares of this company by fraudulent representations. There it stops. Had it gone on to say that the ulterior purpose of the defendants was, by getting the settlement-day and the quotation, to defraud the public, I think the count would have been good. By "the public" I mean those who were disposed to buy shares in the company. But the count stops there, and I must say I think it is bad.

Now with regard to the second count, which we are of opinion is sufficient, I confess it is not without much hesitation and doubt that I arrive at that conclusion. The count states in substance, after reciting various circumstances, which it is unnecessary to refer to, that the defendants entered into this conspiracy in order to obtain a quotation of the shares in the Stock Exchange list, to induce persons who should thereafter buy and sell the shares to believe that the company was duly formed and constituted, and had complied with the rules of the Stock Exchange so as to entitle the company to have their shares quoted in the official list. If it had gone on to say that the purpose, for which that belief was sought to be produced in the minds of the persons buying and selling those shares, was to injure them by inducing them to buy shares which were either valueless or, at all events, inferior in value to what they appeared to be, I should have no hesitation whatever in saying that the count was sufficient in point of law. My doubt has been whether the statement that the object of the company was to induce persons to believe, without going on to say

(1) 2 B. & Ald. 204. [(2) 11 Q. B. 245.
(3) 1 Ad. & E. 706.

1876

THE QUEEN v. ASPINALL.

that it was to induce them, acting on that belief, to buy shares, was sufficient, and I should have had more doubt, but for the allegation that it was to induce this deceptive belief in persons who should thereafter buy and sell the shares. I think, on the whole, it is sufficient, because it is difficult to see how that belief, if engendered in the minds of persons buying and selling shares of this company, could have any other effect than that of inducing them to buy and sell under circumstances in which they would not otherwise have bought and sold. Difficult as it is to see how the belief could have any other operation, I think the statement being that the conspiracy was to induce that belief, it must be taken to mean to induce that belief in order to lead persons to deal with those shares, when they would not otherwise have so dealt with them. Upon the whole, therefore, although not without considerable hesitation, I come to the conclusion that this statement is sufficient.

With regard to the question, whether the offence if sufficiently alleged in the indictment was proved, I can entertain no doubt. Having the evidence in my mind, I cannot accede to the proposition that the facts were not sufficient to make out an indictable offence. The facts undoubtedly were that persons were induced to take shares which they never intended to have, except fictitiously, which shares were to be made over to the principal person dealing in this transaction, namely, Mr. Aspinall; that these allottees were perfectly fictitious; and then that the funds of the company, instead of being real, were fictitious also, a small sum being borrowed from the bank, and that sum so manipulated as by degrees to represent the capital of this company as paid up, when in point of fact the whole thing was a fiction from beginning to end. This was done for the purpose of obtaining the settlement-day and quotation on the Stock Exchange. That that was a fraud on the committee of the Stock Exchange no one can for a single moment doubt, and I must say a scandalous fraud. Then the question is, what was the intention? The company had nothing but its shares; it had no capital whatever; and the only object one can see of getting the company on the Stock Exchange was that the shares might be dealt in. I think the offence is one that is made out.

BLACKBURN, J. I am also of opinion that on the evidence there could be no doubt that an indictable offence was adequately proved. Whether it is sufficiently averred in the indictment is a question that I must say a word about presently. I think ever since the case of *Rex* v. *Berenger* (1) it has been perfectly established that, whatever other things may be indictable or not, this is indictable, namely, where parties by false pretences and fraudulent representations and lies enter into a conspiracy together by those means to raise the price of any vendible commodity; and although *Rex* v. *Berenger* (1) was a case relating to the public funds, yet the doctrine of the Court goes further, and extends to any vendible commodity, where the intent is to induce belief produced by lies in order that the purchasers in the market may give higher prices than they otherwise would give. A conspiracy to produce this result by false means, so as to injure the public, is an indictable offence. Here it is proved there was a conspiracy by false means to procure a settling-day and a quotation on the Stock Exchange. The conspiracy was in procuring these things for the purpose of inducing those who should deal on the Stock Exchange and see the quotation, and, consequently, who would deal in those shares, to believe that the company had been proved to the satisfaction of the Stock Exchange to be a real company started to this extent, that the rules of the Stock Exchange had been complied with; so that in consequence of that belief they should think the company was a better company than it really was: the company in fact being one which was not genuine, in which the calls had not been paid, the shares never allotted, and altogether such a company that, if the truth had been known, it never would have been allowed to get on the Stock Exchange. I say all that was done, and I cannot doubt that was a confederacy and a conspiracy with a view that on the settling-day being allowed, and the quotation being permitted, persons dealing on the Stock Exchange should believe that the shares in this particular company were of a greater value than they really were; and that the intention was that dealers should be influenced in the price they should give, I cannot doubt. It was amply proved there was a real conspiracy to do this particular thing.

(1) 3 M. & S. 67.

1876

THE QUEEN v. ASPINALL.

I say nothing about the first count as to its being good or bad, but undoubtedly a few words put in would have made it good. I pass by that, because the second count goes further, and there are more averments than in the first, and we will see whether on the face of the second count the offence is sufficiently laid. Now that count, after referring to the rules of the Stock Exchange, and shewing that a quotation on the Stock Exchange does import into it a representation to the public that the Stock Exchange has authorized the shares to be quoted, and has had proved to it, according to its regulations, that the company is of a particular description and quality, then proceeds: "The jurors say that the defendants did combine, confederate, and agree together with divers other persons whose names are to the jurors unknown, by divers false pretences . . . to injure and deceive the members of the committee, and to induce them, contrary to the true intent and meaning of the rules," &c., "to order a quotation of the shares of the said company in the official list of the Stock Exchange." Had it stopped there I am not certain that it would have been sufficient to shew there was such an object in the conspiracy as to induce the public to buy. I do not say how it would have been, and it is not necessary to consider. But it goes on further, "and thereupon to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the company," that is, future purchasers, dealers in the company, "to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking." Here it stops. Had it gone on and added, "and consequently from the belief that this company was of a different and better quality than it really was to induce sales to be more readily made at a higher price than they were before," the count would have been identical with that in the case of *Rex* v. *Berenger*. (1) But those words are left out, and the question is, whether, upon the averments here, we ought to say that, if the effect of the conspiracy was to induce, by false representations, all persons who deal in a particular article in a particular market to believe that that article is of a better quality and different to what it really is, then it necessarily follows

(1) 3 M. & S. 67.

from that that there was a conspiracy to induce them to enter into bargains which they would not otherwise have entered into, or more readily, or at higher prices than they otherwise would have done. It has been argued that the jury should have been specifically asked questions on this subject, but I do not think so. I find that Lord Ellenborough in the case of *Rex* v. *Dixon* (1), speaking of the motion in arrest of judgment, said: "It was an universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law." Then he says, "Here it was alleged that the defendant delivered the loaves (which were adulterated) for the use and supply of the children, which could only mean for the children to eat." Here, I say, we should be going a great deal too far in wresting words from their plain meaning, and going further than any cases that I have heard of, if we were to say the intention to obtain a quotation on the Stock Exchange, in order to induce persons who buy and sell shares in the company to believe the company was a good company, when in fact it was a bad company, was not an object the consequence of which must necessarily be injurious to those buying and selling. It is, therefore, an inference of law that in doing this act they intended to produce its necessary consequences, namely, that dealers should buy and sell at the higher prices, and so the count alleges quite sufficient in my mind to describe the exact offence charged in the case of *Rex* v. *Berenger*. (2) It may be more prudent in future for those who draw indictments like this to put in a more distinct averment of the offence. It never can do harm.

Then it was argued that a specific question ought to have been put to the jury. It seems to me that it was not necessary, otherwise no verdict would stand. You ask the jury "Do you suppose so and so? if yes, you will find the defendant guilty." The jury say "Yes," and the verdict is entered "guilty." If it were a special verdict in the old form you would then allege that the jury found all the particular facts. But here the jury found that the defendants obtained the quotation by fraud, and that necessarily involves the intention, which I think the indictment sufficiently alleges. It would be monstrous to say we ought to grant a new trial or

(1) 3 M. & S. at p. 15. (2) 3 M. & S. 67.

1876

THE QUEEN v. ASPINALL.

arrest the judgment and enter the verdict for the defendants because the formal question whether the jury thought that getting a false quotation might affect the prices was not in words put to them. I am clearly of opinion that the second count is sufficient to justify judgment, and that the verdict should not be disturbed.

FIELD, J. I am also of opinion that our judgment must be for the Crown. After the doubt which my Lord has entertained, and still to some extent entertains, it would be presumptuous for me to say I have a clear opinion, but I have an opinion, and it will be my duty to express it,—that opinion is that the second count is good.

With regard to the first count, which is based on the allegations that these frauds, which were undoubtedly committed, were committed for the purpose of inducing the Stock Exchange to appoint a special settling-day, it appears by the recital in the count that in all cases of new companies, before the Stock Exchange will appoint a special settling-day, they require certain vouchers to be laid before them as to the position of the new company; among other things they require to know what the amount of capital is, what quantity of the shares have been bonâ fide subscribed for, and what part of and how the capital has been actually paid to the company. They are not satisfied with merely taking a statement of that from the parties seeking to have the special settling-day made, but they require that the bankers' books and the other documents connected with the company which shall vouch this state of things shall be laid before them. The result, of course, is not only that they themselves have to be satisfied that the elements of the new company are sound and good, and such as ought fairly to be dealt with on the Stock Exchange, but that the public who go on the Stock Exchange to deal in the shares shall be satisfied that those matters have been investigated by a competent authority. Now, in the first count, the fraud alleged is that by fraudulent means the committee of the Stock Exchange were induced to appoint a settling-day, that is, the day upon which all transactions in shares, whether bought or sold, should be settled, and the amounts paid or received. Now, inasmuch as to put a new company on the market anywhere else than on the Stock Exchange

would be a very difficult undertaking, it seems to me that the count contains the elements of a very grave offence, because from what is there alleged the public would naturally suppose that the committee of the Stock Exchange had fixed a settling day, that all the requirements of the Stock Exchange had been complied with, and that brokers and others might safely enter into bargains. But undoubtedly the count does stop short of these averments, and I do not wish to forge any fetters by which I might be bound on a subsequent occasion, if any case in principle like this should come before me. With regard to the second count, these averments are supplied. The object of the fraud, as stated in the second count, is the obtaining a quotation, so that the Stock Exchange list, which goes to every corner of England by nine or ten in the morning, should contain the name of the company and the quotation of the shares in it. No doubt any person investing money would resort to the Stock Exchange quotation, as a means of knowing where he might safely put his money and get the necessary interest on it. That being so, the count avers that, by the 129th rule of the Stock Exchange, the requirements of the 128th rule must be complied with, namely, that all the various statements must be made, so that the Stock Exchange, before they allow the company to be quoted, shall be satisfied that it is that which it is represented to be. Then the second count says this was done for the purpose of injuring and defrauding the members of the Stock Exchange, and it goes on further to say, and thereby to induce persons who should thereafter buy and sell the shares to believe the company was duly formed and constituted and had complied with the rules of the Stock Exchange, so as to entitle the company to have these shares quoted in the official list. It is argued that that is not sufficient, because it does not go on and say "to induce those persons thereby to buy and sell." The question upon this is whether the count is fairly capable of this meaning. I think it is. It seems to me the fraud would have been absolutely a barren one if it had not been to raise money by the sale of shares. Then if that meaning can be fairly put on the count, was it supported by evidence? My Lord and my learned Brother have pointed out that it was amply supported by the evidence. Therefore I say,

1876

THE QUEEN v. ASPINALL.

with respect to my Lord's doubt, I feel some difficulty, but in my own mind I have no hesitation in saying our judgment ought to be for the Crown.

Rule discharged.

Solicitors for prosecution: *Abrahams & Roffey.*
Solicitor for Aspinall: *Goldring.*
Solicitors for Knocker: *Wontner & Sons.*
Solicitor for Whyte: *Huxham.*

Feb. 23; *May* 3.

[IN THE COURT OF APPEAL.]

RANDELL, SAUNDERS, & CO. (LIMITED) *v.* THOMPSON.

Arbitration—Revocation of Submission—Stay of Proceedings in Action under Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.

A dispute having arisen between the plaintiffs and the defendant as to the balance due to the plaintiffs for work done for the defendant, they referred the matter, by an instrument in writing, to a specific arbitrator, W. No time was fixed for making the award, and there was no clause as to making the submission a rule of court. W. proceeded in the matter at once, and held his last sitting within three months. Several months having afterwards elapsed, and no award having been made, the plaintiffs, having given notice to W. and the defendant that they revoked the submission, brought an action against the defendant for the alleged balance. The defendant having applied for a stay of proceedings in the action, under s. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125):—

Held, (affirming the judgment of the Queen's Bench Division) 1st. That such an agreement of reference (although not contained in the original instrument under which the matters in dispute arose) was within s. 11.

2ndly. That there was nothing in any of the statutes that made such an instrument irrevocable, and that the revocation was therefore valid.

But, 3rdly (overruling the judgment of Blackburn and Field, JJ., and affirming the judgment of Quain, J.), that in order to bring the case within s. 11 there must be an existing reference capable of being carried into effect; and that, the submission having been revoked, there was no such existing reference.

On the first point, *Blyth* v. *Lafone* (1 E. & E. 435; 28 L. J. (Q. B.) 164) overruled; *Mason* v. *Haddan* (6 C. B. (N. S.) 526) affirmed.

ACTION to recover 99*l.* 6*s.*, being 83*l.* balance of a builder's bill, together with interest.

An order was made by a master for a stay of proceedings under s. 11 of the Common Law Procedure Act, 1854.

It appeared from the affidavits on which the order was obtained by the defendant, that the plaintiffs had done the stonework of a church for the defendant, who was the contractor for building it; and that a dispute had arisen as to the balance, and the surveyors who had been employed by the plaintiffs and defendant respectively having been unable to come to terms, they, with the sanction of their respective principals, signed and sent the following letter on the 4th of February, 1875:—

"Re St. Mark's Church, Walworth.

"Messrs. Randell, Saunders, & Co. and Mr. J. Thompson.

"G. B. Williams, Esq.—Dear Sir,—In the above matter a dispute has arisen between the parties respecting the balance due from the defendant (a builder) and the plaintiffs who executed the stonework at the above works. In consideration of the parties not being able to arrange the matter amicably, we, the undersigned, acting as the respective surveyors in the matter, beg that you will undertake to arbitrate between us, and do hereby agree that your award shall be final and binding upon both parties without any appeal whatever, and shall be glad to receive an early appointment from you."

Mr. Williams accepted the reference, and at once proceeded to hold sittings and examine witnesses, his last sitting being in April, 1875. No award having been made at the end of that year this action was commenced.

The plaintiffs took out a summons before Denman, J. to rescind the order, and the question, whether there was any jurisdiction under s. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (1), was referred by him to the Court; the

(1) 17 & 18 Vict. c. 125, s. 11: "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon

1876

RANDELL v. THOMPSON.

question whether there was any sufficient reason why the matters should not be referred being reserved for the judge at chambers.

There was an affidavit made on behalf of the plaintiffs, stating that before action, viz., on the 13th of December, 1875, notice was given by the plaintiffs' solicitors to the arbitrator that they revoked the submission, and a formal demand was then made on the defendant, who expressed his surprise at the demand as the matter had been referred, and he was then informed by the solicitors that the submission was revoked and an action would be commenced unless he at once came to a settlement, after which the writ was issued.

The submission had not been made a rule of court.

Q. B. D.

Feb. 23. *Lane*, for the plaintiffs, in support of the motion. First, this not being an agreement to refer contained in the instrument under which the matters in dispute arose, is not within the Common Law Procedure Act, 1854, at all: *Blyth* v. *Lafone*. (1) In *Mason* v. *Haddan* (2) Willes, J. appears to have thought that decision wrong, but the case was decided on another ground on the merits. Secondly, the case is taken out of s. 11 by the revocation. There is nothing in any of the statutes which takes away the power to revoke a submission, when there is no express clause as to making it a rule of court, and when it has not been made a rule of court: *Rouse* v. *Meier*. (3)

[BLACKBURN, J. There may be plausible or even good ground for saying the submission is revoked; but does not the agreement to refer remain? The plaintiffs are still liable for damages for not referring. And is there not, therefore, jurisdiction under s. 11 ?]

---

being satisfied that no sufficient reason exists why such matters cannot be, or ought not to be, referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

(1) 1 E. & E. 435; 28 L. J. (Q.B.) 164.

(2) 6 C. B. (N.S.) 526.

(3) Law Rep. 6 C. P. 212.

No; this is a reference to a specific arbitrator, and the case is therefore not within s. 12; moreover he is functus officio, not only by reason of the revocation of authority, but also by reason of the lapse of three months under s. 15.

Bigham shewed cause. As to the point last made, the time may be enlarged, even after the original time has lapsed: *Denton* v. *Strong*. (1) It is conceded that an action would lie against the plaintiffs for the breach of this agreement to refer; this shews that the agreement is still subsisting, and the legislature by s. 11 has superadded the power, in such a case, to the Court to stay an action brought in breach of the agreement. But even if there is no longer an existing agreement, the terms of s. 11 are wide enough to embrace the case: for the matters may still be referred "according to such agreement," that is, on like terms.

BLACKBURN, J. The chief point in this case is the effect of the agreement, which was signed by the agents of the two parties, and was made after the matters in dispute had arisen, and referred the disputes then existing to a named arbitrator. And the first question is whether such an agreement is within the meaning of the first part of s. 11 of the Common Law Procedure Act, 1854, and we are all agreed that it is within it. The Court of Queen's Bench, in *Blyth* v. *Lafone* (2), certainly appears to have decided that an agreement to be within that section must be an agreement to refer disputes arising out of the agreement itself. In the subsequent case of *Mason* v. *Haddan* (3), in the Common Pleas, Willes, J., doubted whether the Court of Queen's Bench really meant to decide that; but the report in the Law Journal as well as that in Ellis and Ellis certainly goes to shew that the Court did decide that; and both Willes and Byles, JJ., said that if the Court of Queen's Bench did so decide they could not agree with the decision. That being so, we have to decide which of these two opposite opinions to follow, and we are all agreed that the words, "Whenever the parties to any deed or instrument in writing shall agree that any then existing or any future differences

(1) Law Rep. 9 Q. B. 117. (2) 1 E. & E. 435; 28 L. J. (Q.B.) 164. 5 Jur. N.S. 364.
(3) 6 C. B. (N.S.) 526.

1876

RANDELL v. THOMPSON.

shall be referred to arbitration," are general, and apply as much to disputes existing at the time of the agreement as to disputes arising out of the matters which were provided for by the written agreement itself: and so in this respect we agree with the opinion of the Court of Common Pleas, and dissent from *Blyth* v. *Lafone*. (1) The next question is whether there is power to stay the proceedings in this action under the circumstances of this case. The master thought there was power, and my opinion is that we have the power, and if Denman, J., thinks there is no sufficient reason why he should not do so, that he ought to stay the action. Prior to this Act such an agreement to refer could only have been enforced by an action. The agreement to refer did not oust the jurisdiction of the Courts, but the defendant might recover damages in an action for not referring according to the agreement. But now, as I read the Act, whenever a party has agreed to refer an existing dispute or future difference, he is not merely to be liable in damages, but the Court is to have power to stay the proceedings if he brings an action in breach of his agreement, upon being satisfied that no sufficient reason exists why the dispute ought not to be referred according to the agreement; and so force the party to do what is right.

In the present case the agreement was to refer existing disputes to a particular person named; nine or ten months have elapsed, and no award has been made; and though the Court or a judge has power to enlarge the time for making the award, this has not yet been done, and consequently the award if now made would not be a good award. Further than that, the plaintiffs have given notice that they revoked the arbitrator's authority. It has been decided in *Mills* v. *Bailey* (2) and in *Rouse* v. *Meier* (3) that although under s. 17 such an agreement may be made a rule of court, still that does not prevent it being revocable. The consequence is that the arbitrator in this case could not now make an award, notwithstanding the agreement to refer to him, which has been broken by what the plaintiffs have done in revoking the authority of the arbitrator. But if the plaintiffs please they may

(1) 1 E. & E. 435; 28 L. J. (Q.B.) 164. (2) 2 H. & C. 36; 32 L. J. (Ex.) 179.
(3) Law Rep. 6 C. P. 212.

concur with the defendant in assenting that this gentleman shall make his award, and with this consent he may do so, and it will then be good; assuming there is no sufficient reason shewn why it should not be done, why it is not within the statute. The section talks of an agreement to refer; here there is an agreement to refer, although as a submission to a particular arbitrator it has been revoked; why should not this agreement be enforced by a stay of the action, assuming no reason on the merits to be shewn against it? If the plaintiffs go on with the action there is no remedy at all, but if the action is stayed they may get rid of the stay by offering to concur with the defendant in allowing the arbitrator to make his award, which it would be just and proper he should make. If, on the other hand, the defendant were to refuse to join in re-appointing the arbitrator, that would, of course, be a very good reason for applying to a judge to take away the stay of the action. Though my Brother Quain has taken a different view, I am not able to see why this should not be done. The power does not depend upon there being a pending reference, but upon there being an agreement to refer, and there being no reason why it should not be carried out. It seems to me that the power is given by s. 11; and, consequently, I think this motion should be refused, it being left to the judge at chambers to decide the case upon the merits.

QUAIN, J. I regret that I differ from my learned Brothers. I quite agree that we must give a reasonable construction to s. 11 of the Act, and to the words "existing differences," and that *Blyth* v. *Lafone* (1) cannot be supported; but where I venture, with great respect and diffidence, to differ from my Brother Blackburn, is, first, with regard to the effect of the revocation upon s. 11, and, secondly, with regard to the fact that at the time this application was made the three months provided for by s. 15 had expired, and the arbitrator was at that time functus officio.

Now with regard to the revocation: Prior to the Act of Wm. 4, it was well established that whenever parties have agreed to refer there is also the right to revoke before the award is made. That

(1) 1 E. & E. 435; 28 L. J. (Q.B.) 164.

1876

RANDELL v. THOMPSON.

is shewn as early as *Vynior's Case* (1) cited by Willes, J., in *Rouse* v. *Meier*. (2) The common law enabled either party before the award to revoke the submission at his will and pleasure. The first attempt to restrict this power was by 9 & 10 Wm. 3, c. 15, but that was by attachment, which was a very imperfect remedy, as Willes, J., pointed out. Then came the Act of 3 & 4 Wm. 4, c. 42, s. 39, which enacts that where there is a submission to arbitration by an agreement which is to be made a rule of court, there shall be no power of revocation without leave of the Court. That is the way the law stood at the time of the passing of the Common Law Procedure Act, 1854. It was expressly decided in the two cases cited by my Brother Blackburn, that the Act made no difference as to the power to revoke such a submission as the present, and that where there is no clause in the submission as to making it a rule of court, neither s. 17 nor s. 7 brings the case within the Act of Wm. 4, but leaves either party with the same power as to revocation as before. That being the law with regard to revocation, the question is whether s. 11 practically interferes with that power. It does not say a word about revocation, and, as it seems to me, it provides for a stay of an action only where there is an agreement to refer, because on the action being stayed the dispute can be decided in the reference, no revocation having taken place. But where the authority of the arbitrator has been revoked, so as to render the making of an award impossible, it seems to me that s. 11 cannot apply, and that the person who has revoked, though liable to an action for a breach of the agreement to refer, has put it out of the power of the Court to stay his proceedings; the intention of the legislature being that the reference should go on. It seems to contemplate that the reference should be alive, otherwise the result would be that the action would be stayed, yet there would be no power to go on with the reference. The section seems to contemplate an existing reference that may go on, and an award that may be made under that agreement. Where the reference is gone, I cannot think this power to stay the action remains. It is admitted on all hands that the parties in the present case had a right to revoke, the plaintiffs therefore had

(1) 8 Rep. 81 b. (2) Law Rep. 6 C. P. at p. 217.

a right to prevent this particular arbitration, and there being no agreement to refer except to this particular arbitrator, no valid arbitration is possible after this revocation. I cannot conceive that where there is no possibility of making a valid award except by a fresh consent, the Court can stay the proceedings in an action.

I am also disposed to agree with Mr. Lane as to s. 15. The application is made under s. 11. At the time the application was made the three months had elapsed. The submission has not been made a rule of court. It strikes me that at all events the defendant was not in a condition to make this application until he had complied with s. 17, by first making the submission a rule of court, and then applying, under s. 15, to enlarge the time so as to make it a live arbitration; and then, possibly, when the action is stayed the arbitrator might be able to proceed without any fresh consent. Of course they may do anything they please by a fresh consent, but in my opinion, under s. 11, in order to enable the judge to stay, there must be power to proceed with the reference under an existing agreement without a fresh consent. My two reasons for holding the case not within s. 11 are: 1. There has been a revocation. 2. The time for making the award had lapsed before the plaintiffs brought their action.

FIELD, J. I have come to the conclusion that the judge has power to stay the proceedings under s. 11. The plaintiffs and defendant agreed to refer the differences in question to a particular arbitrator, who is alive, and able and willing to go on with the reference. The plaintiffs have revoked the agreement, and I agree they had power to do so. They have gone one step further, and brought an action for the very matters in difference which they solemnly agreed to refer to Mr. Williams. The question is, therefore, has the Court power to stay that action? It is said that power cannot be exercised—1. Because three months having elapsed under s. 15 the arbitrator's power is gone; 2. That one of the parties has broken the agreement by revoking the submission, and so prevented the making of any award. It seems to me that both these matters may be dealt with upon the special terms

1876

RANDELL v. THOMPSON.

upon which the judge may exercise his jurisdiction, that is, on the question whether there is any sufficient reason why the matter should not be referred according to the original agreement, and it seems to me there is not sufficient reason. The person to whom the parties agreed to refer will, if called upon, go on with the arbitration, and I see no reason why one of the parties should be allowed to revoke the agreement, and so get rid of the beneficial effects of s. 11.

So as to enlarging the time. This may be done at any time, and the judge, when the case comes before him, will no doubt say that this lapse of time is not sufficient reason for not staying the action. The time may be enlarged at any moment, and the judge can at once do it, or as soon as any application is made for that purpose. I see no reason why the action, brought in violation of the agreement, should not be stayed, and why the matter should not be put in course for reference.

Motion refused.

On appeal.

C. A. May 3. *Lane* for the plaintiffs.

Bigham for the defendant.

JESSEL, M.R. I am of opinion that the appeal should be allowed. The question is shortly, whether the Court is entitled, under s. 11 of the Common Law Procedure Act, 1854, to stay an action where there is no subsisting agreement to refer capable of being performed. In the present case the agreement to refer, or rather the submission, not having been made a rule of court, was revoked before action brought, so that at the time of action brought, the revocation being valid, there was no agreement capable of being performed. It is quite true that, in spite of the revocation, the parties could have agreed that the arbitrator should proceed; but that would have been to make a new agreement, and would not have been under the agreement then existing; because, although the plaintiffs might have withdrawn their revocation, the arbitrator could not have proceeded without the assent of the defendant, and it would in reality have been under a new agreement, and not under any agreement which could have been per-

formed at the time the action was brought. By the terms of s. 11 the Court or judge is authorized to stay the proceedings if they are satisfied that no sufficient reason exists why the matters cannot or ought not to be referred according to the agreement. Now, if the agreement is shown to the Court to be revoked, it follows that the Court must be satisfied that there is a sufficient reason why the matters cannot be referred according to the agreement. There must be, as it seems to me, a subsisting agreement at the time of action brought, in order to bring the case within the section, and if the only agreement be a submission to a particular arbitrator which has been revoked, it follows that the section does not apply. The decision of the Queen's Bench must be reversed, and the order absolute to rescind the master's order staying proceedings.

KELLY, C.B. The present agreement is to refer a difference already existing to the arbitration of a person named; that agreement having been revoked, the submission, which is all that it amounted to, is at an end. This section enables the Court to interfere by a stay of proceedings in an action, notwithstanding the submission has been revoked, when there is an agreement still subsisting to refer the matters, but that contemplates an agreement to refer in futuro as distinct from the mere submission consequent thereon to a particular arbitrator named, and in such a case the revocation of the submission would leave the agreement to refer still existing. But in this case there was no agreement beyond the mere submission to the arbitration of Mr. Williams, and that having been revoked, there is now no agreement to refer, and consequently the Court cannot interfere.

If the Court were to interfere under s. 11 and stay the proceedings in the action, the effect would be to compel the plaintiffs to consent to allow the arbitration to proceed notwithstanding the revocation, but that would be to compel them to enter into a fresh agreement. The plaintiffs may have acted capriciously and without good cause in revoking this submission, but that is not before the Court. The defendant might have made the submission a rule of court, and so possibly have prevented the revocation; but he has not done so, and by the law of England the revocation

1876

RANDELL v. THOMPSON.

was valid. In order to enable the Court to interfere the statute requires that there should be an existing and operative agreement.

MELLISH, L.J. I am of the same opinion. I think s. 11 must be taken to refer to an existing agreement, in the sense of an agreement capable of being carried into effect; but here, although the parties agreed to refer to Mr. Williams, that submission has been revoked, and no agreement remains which is capable of being carried into effect. I agree with the judges of the Queen's Bench Division, that s. 11 is not confined to cases where there is a general agreement in a deed or other instrument that all differences arising under it shall be referred to arbitration; but applies also to an agreement to refer collateral to the deed or instrument under which the dispute arises. But then there is a material difference between an agreement to refer all matters that have arisen and an agreement to refer an existing dispute to a particular arbitrator. Where the agreement is general, although the parties might revoke a submission in pursuance of it to a particular arbitrator, yet the general agreement to refer, I should be disposed to think, would still continue capable of being carried into effect. But where, as here, there is no agreement to refer except the agreement to refer the particular matters already arisen to a particular arbitrator, and that agreement has not been made a rule of court, and there is no clause in it that it may be made a rule of court, and consequently it is an agreement capable by law of being revoked, and it is revoked, the whole agreement is at an end. No doubt the plaintiffs might be compelled by a stay of proceedings to consent that the arbitrator should proceed and make his award; but that would be under a new agreement, and the original agreement, after revocation, could never be carried into effect. Field, J., appears to have thought that it did not signify that the three months had elapsed, and that the time for making the award might be enlarged at any time; but after the submission has been revoked the power of the judge to enlarge the time is gone, and the power of enlargement can only refer to an agreement capable of being performed. If this power of enlargement

and to stay proceedings were held to apply where the submission had been revoked, it might equally apply where the arbitrator had made an invalid award, or had refused to award, or an award had become impossible. In all those cases the Court could enlarge the time, and if an action were brought, stay the proceedings, and so compel the parties to enter into a fresh agreement to refer. The legislature have not given this power; and if they had intended to enact that no agreement to refer should be revoked, they might have said so in express terms.

DENMAN, J. Having had the case before me at chambers, I wish to say that whether the plaintiffs were right or wrong in revoking the submission when they did forms no part of my judgment; that matter was not gone into at all. I agree with my Brother Quain and the members of this Court that s. 11 does not apply. I do not at all say that my opinion would have been the same if this were the case of an agreement to refer antecedent to the submission. Here the only agreement to refer is the actual submission to refer a particular matter to a named arbitrator which has been revoked; so that the whole matter is at an end. The reason, as it appears to me, why the judgments of Blackburn and Field, JJ., cannot be sustained is that they do not appear to have given sufficient weight to the words "cannot be referred."

Order of Master rescinded. The costs to be plaintiffs' costs in any event.

Solicitor for plaintiffs: *A. E. Copp.*
Solicitors for defendant: *Pritchard, Englefield, & Co.*

1876
May 13.

THE VESTRY OF ST. LUKE *v.* THE NORTH METROPOLITAN TRAMWAYS COMPANY.

Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 26 & 28—*Expenses of Superintendence of Road Authority.*

By the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 25, every tramway authorized by special Act shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road. By s. 26, the promoters from time to time, for the purpose of laying down, maintaining, and renewing any tramway, or any part thereof, may open and break up any road, subject to the following regulations: 1. They shall give to the road authority seven days' notice of their intention, specifying the time when and the portion of the road which they intend to break up and open; 2. They shall not open or break up any road, except under the superintendence and to the satisfaction of the road authority; 3. They shall pay all reasonable expenses to which the road authority is put on account of such superintendence. By s. 28, the promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road as lies between the rails of the tramway, and eighteen inches beyond the rails on each side of the tramway.

A tramway was laid as follows: The rails were laid on longitudinal sleepers, which rested in and upon a bed of concrete six inches thick, extending under the whole space between the sleepers and for a considerable distance on each side. Upon the concrete rested, both between and on each side of the rails, granite paving stones, which formed the surface of the roadway for general traffic, the upper surface of the stones being level with the surface of the rails. During the year 1872–73, the defendants, the tramway company, without any previous notice, on different occasions lifted and relaid paving stones between and within eighteen inches on either side of the rails, sometimes as many as a dozen stones at one time, in order, by slightly lifting the sleeper with a lever, and packing ballast under it, to raise the surface of the rail, which had sunk below the level of the stones. For the safety of the general traffic over the road, it was necessary that any sinking of the rails below the level of the stones should be immediately made good. It would not be possible, consistently with the safety of the general traffic, to wait for the expiration of a seven days' notice before doing so. The surveyor of the plaintiffs, the road authority, from time to time inspected and examined the work while being done by the defendants:—

Held, that what the defendants had done came under s. 28, and not under s. 26, and the plaintiffs were not entitled to be paid by the defendants the expenses of the superintendence.

CASE stated in an action to recover the amount of an award and moneys alleged to be recoverable under the Tramways Act, 1870, in respect of the superintendence by the plaintiffs of works in connection with the defendants' tramways.

1. The plaintiffs are the road authority for the parish of St. Luke, in the county of Middlesex.

2. The defendants were incorporated as a Tramway Company by the North Metropolitan Tramways Act, 1869, and are subject to the regulations of Part II of the Tramway Act, 1870 (33 & 34 Vict. c. 78). (1) A portion of their tramway, made under

(1) 33 & 34 Vict. c. 78, s. 25: "Every tramway which is hereafter authorized by special Act shall be constructed on such gauge as may be prescribed by such special Act, and if no gauge is thereby prescribed, on such gauge as will admit of the use upon such tramways of carriages constructed for use upon railways of a gauge of four feet eight inches and half an inch, and shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road, and shall not be opened for public traffic until the same has been inspected and certified to be fit for such traffic, in the prescribed manner."

Sect. 26: "The promoters from time to time, for the purpose of making, forming, laying down, maintaining, and renewing any tramway duly authorized, or any part or parts thereof respectively, may open and break up any road, subject to the following regulations:—1. They shall give to the road authority notice of their intention, specifying the time at which they will begin to do so, and the portion of road proposed to be opened or broken up, such notice to be given seven days at least before the commencement of the work: 2. They shall not open, or break up, or alter the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority, unless that authority refuses or neglects to give such superintendence at the time specified in the notice, or discontinues the same during the work: 3. They shall pay all reasonable expenses to which the road authority is put on account of such superintendence: 4. They shall not, without the consent of the road authority, open or break up at any one time a greater length than one hundred yards of any road which does not exceed a quarter of a mile in length, and in the case of any road exceeding a quarter of a mile in length, the promoters shall leave an interval of at least a quarter of a mile between any two places at which they may open or break up the road, and they shall not open or break up at any such place a greater length than one hundred yards . . . ."

Sect. 27. "When the promoters have opened and broken up any portion of any road, they shall be under the following further obligations, namely: 1. They shall with all convenient speed, and in all cases within four weeks at the most (unless the road authority otherwise consents in writing), complete the work on account of which they opened or broke up the same, and (subject to the formation, maintenance, or renewal of the tramway) fill in the ground and make good the surface, and to the satisfaction of the road authority, restore the portion of the road to as good condition as that in which it was before it was opened, or broken up, and clear away all surplus paving or metalling material, or rubbish occasioned thereby: 2. They shall in the meantime cause the place where the road is open or broken up to be fenced and watched, and to be properly lighted at night: 3. They shall bear or

1876

VESTRY OF ST. LUKE v. NORTH METROPOLITAN TRAMWAYS CO.

the powers conferred on them by the North Metropolitan Tramways Act, 1870, and completed before Midsummer, 1872, runs through the parish of St. Luke.

3. The mode in which the tramway is constructed and laid is as follows: The rails are laid on longitudinal timber sleepers about 16 to 26 feet in length, connected together at intervals by transverse tye-rods of iron. The sleepers rest in and upon a bed of concrete about six inches in thickness extending under the whole distance between the sleepers and for a considerable distance on each side. Upon this concrete also rest, both between and on each side of the rails and sleepers, granite paving stones of about the same thickness as the concrete, and which also form the surface of the roadway for general traffic, the upper surface of the stones being level with the surface of the rails.

4. A tramway constructed as mentioned in paragraph 3 could be used for a few days, but would not be permanently stable or durable without there being for the whole distance between the sleepers and for a distance of about 18 inches on each side either granite paving stones or some other solid packing.

5. During the year commencing at Midsummer, 1872, and ending at Midsummer, 1873, the defendants on some occasions lifted and relaid paving stones between and within 18 inches on either

---

pay all reasonable expenses of the repair of the road for six months after the same is restored, as far as those expenses are increased by the opening or breaking up. . . . ."

Sect. 28: "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway. . . . ."

Sect. 33: "If any difference arises between the promoters or lessees on the one hand, and the local authority or road authority . . . . on the other hand . . . . with respect to the amount of any compensation to be paid by or to the promoters or lessees . . . . the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference shall be borne and paid as the referee directs.

side of their rails in the plaintiffs' parish, sometimes one or two, sometimes more, sometimes as many as a dozen stones at a time, in order by slightly lifting the sleeper with a lever, and thrusting ballast or other material under it, to raise to its proper level a sleeper which had sunk, and so brought the surface of the rail below the level of the stones, or for some other purpose directly connected with the sleepers and rails themselves.

6. On many occasions during the same year the defendants in like manner lifted and relaid stones, because the stones had sunk below the level of the rails, and it was necessary to raise them by placing ballast or other material underneath them.

7. Where stones have sunk as mentioned in paragraph 6, it would be a prudent thing for the security of the sleepers and rails to make good the defect, because if such defect were to spread and become extensive, it might in time endanger the stability of the sleepers and rails; but the sinking of a few stones would cause no immediate danger to them. For the safety of the general traffic over the road it is necessary that any such sinking of the stones below the level of the rails and any sinking of the rails below the level of the stones should be immediately made good. It would not be possible consistently with the safety of the general traffic to wait for the expiration of a seven days' notice before doing so, and a gang of men is constantly or almost constantly employed by the defendants for this purpose up and down their tramway lines, under the superintendence of the defendants' engineers.

8. Unless the matters mentioned in paragraphs 5 and 6 amount to opening or breaking up of the road, there was no opening or breaking up of any road by the defendants in the parish of St. Luke during the year from Midsummer, 1872, to Midsummer, 1873.

9. During that year Mr. Joseph Niblett was surveyor to the parish of St. Luke, and as such he was paid a salary by the plaintiffs; and it was his duty as such surveyor, amongst other things, to superintend, and he did superintend, all the roads in the parish under the charge of the plaintiffs. Mr. Niblett was frequently up and down the line of the defendants' tramway, and from time to time inspected the condition of the tramway and the road. He from time to time called the attention of the defendants to any defects which he thought existed in the tramway or the paving

1876

VESTRY OF ST. LUKE v. NORTH METROPOLITAN TRAMWAYS CO.

for which the defendants were responsible, and called upon them to make them good, and he from time to time inspected and examined the work being done by the defendants, as mentioned in paragraphs 5 and 6.

10. No notice was ever given by the defendants to Mr. Niblett, or to any other person on behalf of the plaintiffs, of their intention to do any of the things mentioned in paragraphs 5 and 6; nor was any such notice ever demanded or any complaint made of its not being or having been given; nor, except as mentioned in paragraph 9, was any notice ever given to the defendants that Mr. Niblett or any person on the part of the plaintiffs was superintending or claimed to superintend any work done by the defendants.

11. The plaintiffs claimed from the defendants the sum of 25*l.*, alleging that they were entitled to recover that sum as the reasonable expense of superintendence for the year from Midsummer, 1872, to Midsummer, 1873, under Part II. of the Tramways Act, 1870. This sum of 25*l.* was paid by the plaintiffs to Mr. Niblett before such claim was so made upon the defendants.

12. The defendants declined to pay the sum so claimed; and thereupon the plaintiffs, alleging that a difference had arisen between them and the defendants with reference to the said claim within the meaning of s. 33 of the Tramways Act, 1870, applied to the Board of Trade to appoint a referee to settle such matter in difference, and the Board of Trade appointed a referee accordingly. The appointment recited ss. 26 and 33, and that a difference had arisen between the plaintiffs and the defendants as to compensation to be paid by the defendants to the plaintiffs, viz. 25*l.* claimed by the plaintiffs as the amount paid by them to their surveyor for one year's superintendence by him, from Midsummer 1872 to Midsummer 1873, of the taking up and laying down of the tramways of the defendants, for the purpose of the repairs and maintenance of the rails of the defendants, and the reinstatement of the pavements on either side of the tramways of the defendants.

13. The defendants protested to the Board of Trade against the appointment of the referee, and against his proceeding to hear or determine the matters in difference. The defendants in like manner protested to the referee against his so proceeding, and all the proceedings before him were subject to such protest.

14. The facts proved before the referee were those hereinbefore stated. And it was contended on the part of the plaintiffs, and denied on the part of the defendants, that the plaintiffs were entitled to recover from the defendants a sum of money as the reasonable expense of superintending the opening and breaking up of roads by the defendants within the meaning of the 26th section of the Tramways Act, 1870.

15. The referee made his award on the 14th of July, 1874. The award had the same recitals as the appointment, and awarded that the defendants pay to the plaintiffs 15*l.* in satisfaction of the claim of the plaintiffs against the defendants in respect of such cost of superintendence from Midsummer, 1872, to Midsummer, 1873.

16. The Court may draw inferences of fact.

17. It is agreed that the amount of costs, if any, recoverable under the award, and the amount, if any, recoverable in respect of superintendence apart from that award shall be ascertained, if necessary, by the arbitrator by whom this case is stated.

The questions for the opinion of the Court are: 1st. Whether the plaintiffs are entitled to recover upon the award. 2nd. Whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in paragraph 5. 3rdly. Whether the plaintiffs are entitled to recover in respect of superintendence of the matters mentioned in paragraph 6.

Finlay, for the plaintiffs, contended that the award was final, and could not be reopened. That the work mentioned in paragraphs 5 and 6, or at all events in paragraph 5, came under s. 25 as an opening of the road to relay the tramway, and the fact that the object was also to keep the road in a proper state for general traffic did not the less make the work an opening of the road for the proper relaying of the tramway. The omission to give the notice would not deprive the plaintiffs of the right to superintend the work and to be repaid by the defendants what they had paid for the superintendence.

Beresford, for the defendants, contended that what was stated in paragraph 5 to have been done was really simply a performance by the defendants of the duty imposed upon them by s. 28, of keeping the road fit for general traffic, and the superintendence of this

1876

VESTRY OF ST. LUKE v. NORTH METROPOLITAN TRAMWAYS CO.

came under the road surveyor's general duties, and was not to be paid for by the defendants.

BLACKBURN, J. I think that when we once get at the facts of this case we must say the plaintiffs cannot recover upon this award, but that there is or may be something under paragraph 5 which can be recovered. First of all, I may deal with what has been said, that the award is final. Where there is a matter referred to an arbitrator by this Act, just like matters under the Lands Clauses Act, if the arbitrator has awarded upon matter that is within his jurisdiction and matter that is not within his jurisdiction, and the two are inextricably involved together, so that the Court cannot separate them, the matter must then be held to have been beyond his jurisdiction, and the award would not be final. That has been repeatedly held in cases where the inquisition before a jury has been brought up. Where the certiorari has been taken away the Court can only review the finding of the jury on the ground of excess of jurisdiction. It has been repeatedly held that when the jury did take into account matters which they had no right to take into account, though they also took into account matters which they had a right to take into account, that that was an excess of jurisdiction, and though the certiorari was taken away the inquisition could be brought into the Court above. Now, as this case is stated, it would appear that in making the award something was given both for matters stated in paragraph 5 and in paragraph 6. We have not got any statement before us, nor any means of saying how much was given in respect of each.

The first question, therefore, that arises upon the sufficiency of the award, comes to be, whether both cases are within the matters over which the arbitrator had power to award. Now as to that the whole question turns upon the Tramways Act. The 25th section of that Act authorizes the promoters to lay down a tramway in a particular mode, one part of which is that it shall be of a particular gauge, and that it "shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road, and shall not be opened for public traffic until the same has been inspected and certified to be fit for such traffic, in the prescribed manner." I can construe

that in no other manner than as meaning this: that in laying down these rails the top of the rails is to be brought up and kept level with the surface of the road, because the top of the rails is part of that over which the public has a right to drive, and although it is the property of the tramway company, must be kept to that level, because the public in driving has a right that their wheels shall rest upon that rail, which is neither to project above the road so as to be a tripping impediment, nor to sink below it so as to be a thing injurious to the traffic; but it is to be kept level with the surface of the road.

Then comes the next question, which is, what is the liability of the company in respect of this tramway and road? Now the legislature has given them two different powers. First, there is s. 26, which authorizes them to break open the roads for the purpose of making, forming, laying down, maintaining, and renewing any tramway duly authorized, subject to various conditions, which come to this, that when they are breaking open the roads for the purpose of (inter alia) maintaining any tramway, they are required to give seven days' notice, which, where the things are slight, they may be excused not giving; for instance, where things require to be instantly done. That, however, has not been thought of by the legislature. Then it is further said that they must give notice, so that the superintendent may come and superintend their doing of the works at the time specified in the notice; and they shall pay all reasonable expenses to which the road authority have been put by such superintendence.

Now, when they are doing anything that amounts to breaking up the road and laying it down, they are to give that notice and call for that superintendence; and one question arising here is, if they are doing the thing for the maintaining of the tramway, and either rightly or wrongly, where the thing is required to be done promptly, the seven days' notice has not been given, is the road authority entitled to examine and superintend the work to see that it is perfectly good and to recover the cost of the superintendence? I think they are entitled, because, although the company may be excused from giving the notice because the work requires to be done promptly, they are by no means excused from the duty of doing it in such a way as to make the

1876

VESTRY OF ST. LUKE v. NORTH METROPOLITAN TRAMWAYS CO.

road perfect. I think the road authority have as much right to come and look and see that they have done it properly and correctly, as they would have had if they had had the notice, and to charge the defendants with the expense.

Then comes s. 28, which says: "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair the road," which, as I have already said, in my opinion, includes the surface of the rails brought up level to the road. They are to do all that, and maintain it; and although no doubt the road authorities must see and superintend in order to see whether it be properly done, and complain if it is not properly done, no provision is made that they shall be paid for that superintendence, so that it would appear to come within their general expenses as to keeping up the road and keeping it in good order. Now, if what the tramway company have done here is merely that which is required to be done under s. 28, to maintain the road in good order, the road authority have no power to charge for or recover the cost of superintendence under this Act. Paragraph 6, I think, clearly shews that what is mentioned in it was done in pursuance of their duty to maintain and keep the road. The defendants lifted and re-laid the stones which are as stated in the case (at paragraph 3) to form the surface of the roadway. They lifted and relaid the stones because the stones had sunk below the level of the rails, and it is stated that for the safety of the general traffic it was necessary to do that, that is stated in paragraph 7. I think that clearly was maintaining the road in pursuance of their duty under s. 28. Paragraph 5 raises much more difficulty, the earlier part of it is that the defendants were raising these stones—if it had been merely raising these stones—to bring the rails to the level of the road, simply in order that the rails that were a little below the level of the road should be raised to it, if they were only doing that, I should be inclined to say that it came within s. 28; but then it is stated that they did this not only for the purpose of raising the rails to the level of the road, but "for some other purpose directly connected with the sleepers and rails themselves." I cannot but think that that may mean that there was such a state of things and facts that for the purposes connected with the sleepers and rails and for maintaining the tramway properly, independent of

the road, there were things done which would require superintendence.

The case must go back to the arbitrator, and whether he may not find this other purpose so slight that the supposed cost of superintending, 15*l.*, should be cut down to nothing, or find these things so numerous that the whole of the 15*l.* should be given for that, is a matter that the arbitrator must decide according to the evidence before him.

It seems to me the reply to the question we have to answer is that the plaintiffs are not entitled to recover upon the award, that they are or may be entitled to recover in respect of superintendence of some of the matters mentioned in paragraph 5, and that they are not entitled to recover in respect of matters mentioned in paragraph 6. The case will go back to the arbitrator with this direction.

QUAIN, J. I am entirely of the same opinion. I think that paragraph 5 and paragraph 6 (with the exception of the last line in paragraph 5, which we cannot understand), shew that it was a repairing, and maintaining, and keeping in good condition of the road within the meaning of s. 28, for which the plaintiffs are not entitled to charge any superintendence. I find it stated in paragraph 7 that, for the safety of the general traffic over the road, it is necessary that any such sinking of the stones below the level of the rails and any sinking of the rails below the level of the stones should immediately be made good. Therefore, for the safety of the general traffic of the road, it is necessary to do the things mentioned both in paragraph 5 and paragraph 6. Therefore, it appears to me, that the defendants have done nothing more than maintain the road, as directed by s. 28, in good condition and repair, and for that the plaintiffs are not to be paid anything for superintendence.

Case remitted to the arbitrator accordingly.

Solicitor for plaintiffs: *W. W. Hayne.*
Solicitors for defendants: *Tahourdins & Hargreaves.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

ABUSE OF PROCESS—*Staying frivolous and vexatious Action—Groundless Action against public Officer.*] Actions were brought charging the defendants with conspiring to make and making false statements respecting the plaintiff, an officer in the army, to the commander-in-chief, whereby the plaintiff was placed on half-pay. Upon application to stay the actions as frivolous and vexatious, and an abuse of the process of the Court, it was stated in the defendants' affidavits that the actions were for acts done by the defendants in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff:—*Held*, that the actions ought to be stayed, on the ground that *Dawkins* v. *Lord Rokeby* (Law Rep. 7 H. L. 744) was a case directly in point that an action under such circumstances would not lie.—*Castro* v. *Murray* (Law Rep. 10 Ex. 213) followed. DAWKINS *v.* PRINCE EDWARD OF SAXE-WEIMAR. DAWKINS *v.* WYNYARD. DAWKINS *v.* STEPHENSON - - - - 499

ACTION—County Court fees - - 264
See COUNTY COURT FEES.

—— Mutual Insurance—Manager - C. A. 45
See MUTUAL INSURANCE. 2.

ACTION ON BEHALF OF SEVERAL—*Practice—One Person suing for Others having same Interest—Order XVI., Rules* 9, 13—*Schedule to* 38 *&* 39 *Vict., c.* 77—*Security for Costs.*] A writ was issued by the plaintiff "on behalf of himself and numerous parties having the same interest," under Order XVI., Rule 9. The claim was by the plaintiff, on behalf of himself and the other owners of a ship, against the defendants, for freight and dues for the use of the ship.—The defendants applied to add the names of the other owners as plaintiffs under Order XVI., Rule 13, on the ground that the case was not within Rule 9, and also in order that the defendants might have the liability of the other owners, as plaintiffs, for costs:—*Held*, that the action was rightly brought by a single plaintiff under Rule 9, and that the case was not within Rule 13. DE HART *v.* STEVENSON - - - - - - 313

AFFREIGHTMENT—Warranty of seaworthiness
See SEAWORTHINESS. 1. [377

AFTER-ACQUIRED PROPERTY—Bankrupt 145
See UNCERTIFICATED BANKRUPT.

AGENT—Authority—Charges on cargo - 367
See LIEN FOR CHARGES ON CARGO.

—— Negligence - - - - 321
See EVIDENCE OF NEGLIGENCE. 2.

AGISTMENT — *Placing Horse among horned Cattle—Horse gored by Bull—Defect of Fences—Liability of Agister—Absence of Scienter.*] The defendant, an agister of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff:—*Held*, that the fact that the defendant had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of the plaintiff's horse. SMITH *v.* COOK - 79

AGREEMENT AS TO COSTS—*Attorneys and Solicitors Act*, 1870 (33 *&* 34 *Vict. c.* 28, *ss.* 4, 8, 9)—*Receipt containing Terms of Agreement, but signed by Solicitor only—Taxation.*] A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client, but signed by the solicitor only, is not an "agreement in writing" within the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, and the solicitor may be required to deliver a detailed bill of costs, to be taxed in the ordinary way. *Re* E. D. LEWIS. *Ex parte* MUNRO 724

AGREEMENT FOR LEASE—*Statute of Frauds—Work done upon Premises by intended Lessee—Common Counts.*] The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, which he accordingly did, and also laid down gas-pipes, &c.

AGREEMENT FOR LEASE—*continued.*
with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done, &c. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds :—*Held*, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent. *Hodgson* v. *Johnson* (E. B. & E. 685; 28 L. J. (Q.B.) 88) questioned. Pulbrook *v.* Lawes - - - - 284

ALLOTMENT OF WAGES — *Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 169—*Allotment of Wages—Liability of registered Owner of Ship—Charterparty equivalent to Demise.*] By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 169, the wife of any seaman, in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorized the drawing of the note.—The appellant was the registered owner of the ship *Sydney Hall*, and entered into a charterparty with H., by which he demised the ship to him for a stipulated period, and parted with all control over it. H. took possession of the ship, and appointed a master, who engaged the respondent's husband as one of the crew, and gave her an allotment note, allotting and requiring the charterer to pay her 6*l.* monthly out of her husband's wages. H. having become insolvent:—*Held*, that the section did not, under the circumstances, make the appellant, as registered owner, liable to pay the arrears due under the note. Meiklereid *v.* West - - - 428

"ANNUAL EMOLUMENT" - - - 658
See Compensation under Telegraph Act.

APPEAL—Court of—New Trial - C. A. 636
See New Trial.

—— Practice—Counsel heard - C. A. 42
See Remoteness of Damage.

—— Quarter sessions—Evidence - - 9
See Appeal to Quarter Sessions. 3.

—— Quarter sessions—Failure to obtain relief [503
See Appeal to Quarter Sessions. 1.

—— Quarter sessions—Time to appeal - 558
See Appeal to Quarter Sessions. 2.

—— Quarter sessions—Value of land - 608
See Appeal to Quarter Sessions. 4.

—— Striking out pleading - - C. A. 374
See Embarrassing Pleading.

APPEAL FROM SUPERIOR COURT—Rule to justices - - - - 481
See Rule to Justices.

APPEAL TO QUARTER SESSIONS—*Poor-rate—Appeal—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1—"*Failure to obtain Relief.*"] A ratepayer aggrieved by his assessment to the poor-rate, gave notice of objection to the assessment committee, under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1. The committee, considering that a case then pending in a superior court would govern this case, adjourned their decision. The appellant thereupon appealed against the rate to quarter sessions :—*Held*, that the appellant had not "failed to obtain relief" from the assessment committee within the above section; and that the quarter sessions had consequently no jurisdiction. The Queen *v.* The Assessment Committee of Bedminster Union 503

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55) *ss.* 48, 269—*Fourteen Days after "Cause of Appeal"—Time running from Decision, and not from Service of Order.*] By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48, a court of summary jurisdiction may, under certain circumstances, order the local authority to cleanse offensive ditches and execute permanent or structural works. By s. 269, "Where any person deems himself aggrieved by any rate made under the provisions of the Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, he may appeal, subject to the conditions following: 1. The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made. 2. The appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal.—An order was made on the appellants under s. 48, on the 6th of September, and served on them on the 24th. The appellants, on the 2nd of October, served on the respondents notice of appeal to the sessions :—*Held*, that the time for notice of appeal ran from the date of the decision, and not from the service of the order of justices; and, consequently, that the notice was too late. The Queen *v.* The Barnet Rural Sanitary Authority [558

3. —— *Poor-rate—Right to Production and Proof of Ratepayer's Books of Account—Land occupied as a Racecourse—Evidence.*] Upon appeal to sessions against a rate in respect of premises occupied as a racecourse, the respondents have a right to call for the production, and upon non-production, to prove the contents of the appellants' books of account, as an element in ascertaining the rateable value of the occupation. The Queen *v.* Verrall [9

4. —— *Highway Act* (5 & 6 *Wm.* 4, *c.* 50), *ss.* 48, 105—*Sale of Land allotted to Parish for Building Materials—Adjoining Owner's Right of Pre-emption—Price, how to be fixed—Right of Appeal.*] By the Highway Act (5 & 6 Wm. 4, c. 50, s. 48, after reciting that under inclosure Acts land has been or may be allotted to parishes or the surveyors of highways, for the purpose of obtaining materials for the repair of the highways in the parish, and the materials on such land have been or may be exhausted, it is enacted, "that it shall be lawful for the surveyor of the parish, with the consent of the vestry, and with the consent in writing of the justices at a special sessions, to sell the land to some person whose lands adjoin thereto,

APPEAL TO QUARTER SESSIONS—*continued.*
or if he refuse to purchase to any other person, for such price as the justices may deem fair and reasonable." By s. 105, any person who shall think himself aggrieved by any sale made under or in pursuance of the Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of the Act, may appeal to the quarter sessions.—The appellant was the owner of land adjoining an exhausted gravel pit, the soil of which had been previously allotted to the surveyor of highways under s. 48. The highway board, in whom were vested the powers of surveyor of highways, applied to justices at a special sessions to fix the price at which the pit should be sold. The justices by order consented to the sale of the pit, and fixed the price at 450*l.*, which, owing to special circumstances, a gentleman in the parish was willing to give for it. It appeared that 135*l.* 6*s.* 6*d.* was a fair and reasonable price as between the highway board and the appellant, and the 450*l.* a reasonable price having regard to the interests of the parish only:—*Held*, first, that under s. 105 there was an appeal against the order to the quarter sessions; secondly, that the justices were bound to fix the price of the pit fairly as between the adjoining owner and the parish, and not with regard to the interests of the parish exclusively; and that the smaller sum was the proper price. THE QUEEN *v.* THE HIGHWAY BOARD OF DRAYTON IN HALES - - 608

APPEARANCE—Default—Judgment - 404
See SERVICE OUT OF THE JURISDICTION.

APPROPRIATION OF PAYMENT—*Debtor and Creditor—Payments on Account, how to be appropriated.*] The plaintiffs supplied goods to K. & D., who were in partnership, and they gave plaintiffs their acceptance for 132*l.*, the amount. Before the bill was due K. & D. dissolved partnership, and gave notice to the plaintiffs with the intimation that K. would carry on the business, and would receive and pay the accounts due to and from the old firm. The plaintiffs continued to supply K. with goods, and he gave them his acceptance for the amount, and also paid them several sums on account, but without any specific appropriation. After some months the plaintiffs sent in their account to K., beginning on the debit side with the acceptance for 132*l.*, and, after giving him credit for the sums paid, shewing a balance against K. of 92*l.* After this K. paid the plaintiffs two other sums, which, with the sums already paid, amounted to more than 132*l.* Plaintiff having sued K. & D. on their acceptance for 132*l.*, D. pleaded payment:—*Held*, that the plaintiffs having sent in the statement to K. treating the whole as one account, the subsequent payments must be appropriated to the earlier items of the account; and consequently that the plea was proved. HOOPER *v.* KEAY - - - 178

ARBITRATION—Revocation of submission [C. A. 748
See REVOCATION OF SUBMISSION.

—— Rule to pay—Practice - - - 78
See RULE TO PAY MONEY AWARDS.

ARBITRATION CLAUSE—Mutual insurance
See MUTUAL INSURANCE. 1. [Ex. Ch. 563

ARRIVAL OF SHIP—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 237—*Offence of boarding Ship "about to arrive at her Place of Destination before her actual Arrival in Dock or at the Place of her Discharge."*] The respondent was charged under s. 237 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), with boarding without the permission of the master a ship "about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge."—The ship, at the time the respondent boarded her, had just entered the Cumberland Basin in the port of Bristol at 7 p.m. The basin is divided from the river Avon by dock gates, and is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks. There are quays in the basin, but the ship was not intended to discharge in the basin; she remained in the basin all night, and the next morning she was moored further in the floating harbour, and discharged her cargo at the quay there. The justices dismissed the complaint:—*Held*, that the ship had not arrived "at her place of destination" by merely arriving in the port of Bristol, and that she had not "actually arrived at her place of discharge," which was the quay where she ultimately did discharge; but that she had "actually arrived in dock" within the meaning of the section, although the dock was not the dock in which she ultimately discharged; and that the justices' decision was therefore right. ATTWOOD *v.* CASE - - - - - - 134

ASSAULT DURING MARRIAGE—*Husband and Wife—Effect of Divorce—Wife suing Husband after Divorce for Assault during Coverture.*] A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture.—Declaration, that the defendant assaulted and beat the plaintiff. Plea, that at the time of the committing of the grievances, &c., the plaintiff was the wife of the defendant. Replication, that before suit the marriage of the plaintiff and the defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial Causes. On demurrer:—*Held*, that the replication was bad: for that the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband and wife are one person in law. PHILLIPS *v.* BARNET - - - - 436

ASSESSORS—Trial with - - - 362
See TRIAL BY JURY.

ATTORNEYS AND SOLICITORS ACT, 1870, ss. 4, 8, 9 - - - - - 724
See AGREEMENT AS TO COSTS.

AUCTIONEER—Goods privileged from distress
See PRIVILEGE FROM DISTRESS. [210

AWARD—Rule to pay—Practice - - 78
See RULE TO PAY MONEY AWARDED.

BAILMENT—Agistment - - - 79
See AGISTMENT.

BALLOT—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33)—*Prosecution for Offences under—Order for Production of Voting Papers—Conditions for Secrecy—Inspection of Papers at Trial—Rules* 40, 41, 64.] A prosecution having been instituted against a

BALLOT—*continued.*
deputy-returning officer, who had presided at a booth during a municipal election, for offences under the Ballot Act, 1872 (35 & 36 Vict. c. 33), a county court judge, in the exercise of jurisdiction given by sched. 1, part II., rule 64, of the Act, made an order directing the town clerk of the borough to produce and shew, for the purpose of the prosecution, certain rejected ballot papers, counterfoils, counted ballot papers, and spoilt ballot papers relating to the same polling station, and to open the sealed packets containing those documents, and the marked copy of the register, and to take all such proper means as he should deem necessary in order that the mode in which any particular elector had voted should not be discovered; and further ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Blackburn, J., allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected so as to shew how the votes appeared to have been given:—*Held*, that this was rightly done. THE QUEEN *v.* BEARDSALL - - - - C. C. R. 452

BALLOT ACT, 1872 - - - - 452
See BALLOT.

BANKER—Crossed cheque - - C. A. 31
See CHEQUE.

BANKRUPTCY—Uncertificated bankrupt—After-acquired property - - - 145
See UNCERTIFICATED BANKRUPT.

BIGAMY — *First Marriage celebrated elsewhere than in a Church—Presumption that Building was duly licensed.*] Upon an indictment for bigamy it was proved that the first marriage was solemnised, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question:—*Held*, that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the prisoner was properly convicted of bigamy. THE QUEEN *v.* CRESSWELL C. C. R. 446

BILL OF EXCHANGE—Bill of lading—Appropriation - - - - 709
See SECURITIES FOR BILLS OF EXCHANGE.

BILL OF LADING—Equitable assignment 709
See SECURITIES FOR BILLS OF EXCHANGE.

BOARD OF HEALTH—Election—Casual vacancy [217
See ELECTION OF BOARD OF HEALTH. 1.

—— Election—Validity of votes - - 336
See ELECTION OF BOARD OF HEALTH. 2.

BONÂ FIDE TRAVELLER - - - 1
See PUBLIC-HOUSE. 6.

BOROUGH—Bye-law - - - - 12
See BYE-LAW OF BOROUGH.

—— Contribution to county rate - - 152
See COUNTY RATE.

BYE-LAW OF BOROUGH—*Municipal Corporation Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 90—*Bye-laws by*

BYE-LAW OF BOROUGH—*continued.*
Council—Suppression of Nuisance—Victuals unfit for Food—Cheese.] By s. 90 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76) it is lawful for the council of a borough to make bye-laws, inter alia, for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force in such borough.—A town council of a borough made a bye-law "that if any butcher, or dealer in meat, or any fishmonger, poulterer, or other person, shall expose or offer for sale on his premises, or have in his possession with intent to sell or expose for sale, any meat, fish, poultry, or other victuals or provisions, unfit for the food of man, he shall be subject to a penalty, to be recovered before justices, who shall decide on the unfitness."—The appellant, a grocer, exposed for sale on his premises cheese which the justices held was unfit for food, and convicted him accordingly:—*Held*, that to expose for sale, or to have possession of, with intent to sell, things unfit for food, was a nuisance at common law, consequently the bye-law was within the powers of s. 90, and that the appellant was within the bye-law. SHILLITO *v.* THOMPSON - - - - - 12

CARRIER—Felony of servant - - 692
See CARRIERS ACT. 1.

—— Measure of damages - - - 274
See DAMAGES AGAINST CARRIER.

—— Negligence—Carriers Act - C. A. 302
See CARRIERS ACT. 2.

—— Ship—Freight pro ratâ - - 613
See FREIGHT PRO RATÂ ITINERIS.

—— Ship—Seaworthiness - - - 377
See SEAWORTHINESS. 1.

CARRIERS ACT—*Carrier*—1 *Wm.* 4, *c.* 68—*Felony by Carriers' Servants—Evidence of Service—Estoppel.*] To an action for the loss of pictures delivered by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants. The pictures were loaded in a van in the defendants' yard ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M. who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The Court having power to draw inferences of fact:—*Held*, that the defendants were not estopped from denying that the thief was their servant. WAY *v.* THE GREAT EASTERN RAILWAY COMPANY - 692

2. —— *Carrier by Railway — Negligence — 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1—Goods taken beyond Point of Destination.*] A carrier is not deprived of the protection afforded by the Carrier's Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, by the fact that the loss of or injury to goods happens after they have been negligently taken by him beyond their point of destination. The plaintiff took a ticket from York to Darlington by the defendants' railway. Before starting on the journey he handed two water-colour drawings

CARRIERS ACT—*continued.*
(which were tied together face to face, so that it could be seen that they were pictures of some kind) to the guard, asked him to take care of them, and saw them labelled for Darlington. The pictures were above the value of 10*l.*; but the plaintiff made no declaration of the value. When the train arrived at Darlington he got out, took a fresh ticket for Barnard Castle, and told the porter to see that the drawings were taken out and put in the train by which he was starting. The drawings, however, were not taken out, but were carried on to Durham, and when they were recovered by the plaintiff had sustained considerable injury:—*Held*, by the Queen's Bench Division, that the plaintiff was not entitled to recover for the damage to the drawings. By Blackburn and Field, JJ., on the ground that the defendants were protected by the Carriers Act, which applied to the case of goods negligently carried beyond the point of destination. By Quain, J., on the ground that the Carriers Act did not apply to the case, and that the company must be considered as bailees of the pictures beyond Darlington, but that there was no evidence of negligence to make them liable. *Held*, by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the construction put by Blackburn and Field, JJ., on the Carriers Act was correct. MORRITT *v.* THE NORTH EASTERN RAILWAY COMPANY - C. A. 302

CASES—*Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530) distinguished - - 470
See RESCISSION OF CONTRACT. 2.

—— *Baddeley* v. *Gingell* (1 Ex. 319) followed 65
See REPAIR OF ROAD. 2.

—— *Blyth* v. *Lafone* (1 E. & E. 435) overruled
See REVOCATION OF SUBMISSION. [C.A. 748

—— *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 C. P. 189) questioned
See ESTOPPEL BY JUDGMENT. [599

—— *Casson* v. *Roberts* (31 Beav. 613) questioned
See FRAUDS, STATUTE OF. 2. [714

—— *Castro* v. *Murray* (Law Rep. 10 Ex. 213) followed - - - - 499
See ABUSE OF PROCESS.

—— *Dennis* v. *Tovell* (Law Rep. 8 Q. B. 10) overruled - - - C. A. 546
See HARBOUR CLAUSES ACT.

—— *Feather* v. *Reg.* (6 B. & S. 257) followed
See INFRINGEMENT OF PATENT. [C. A. 384

—— *Fitzhardinge* v. *Gloucester Canal Co.* (Law Rep. 7 Q. B. 776) followed - - 696
See COSTS UNDER LANDS CLAUSES ACT.

—— *Hallen* v. *Runder* (1 C. M. & R. 266) followed - - - - 700
See FRAUDS, STATUTE OF. 1.

—— *Hardman* v. *Booth* (1 H. & C. 803) distinguished - - - - 348
See FALSE PRETENCES. 2.

—— *Harwood* v. *Smith* (2 T. R. 750) followed
See FALSE PRETENCES. 2. [348

—— *Henderson* v. *Stevenson* (Law Rep. 2 H. L. Sc. 470) distinguished - - 515
See CONDITION ON TICKET.

CASES—*continued.*
—— *Hodgson* v. *Johnson* (E. B. & E. 685) questioned - - - - 284
See AGREEMENT FOR LEASE.

—— *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123) followed
See EVIDENCE OF NEGLIGENCE. 1. [C. A. 252

—— *Mason* v. *Haddan* (6 C. B. (N.S.) 526) affirmed - - - C. A. 748
See REVOCATION OF SUBMISSION.

—— *Nickling* v. *Heaps* (21 L. T. (N.S.) 754) dissented from - - - 348
See FALSE PRETENCES. 2.

—— *Oakeley* v. *Pasheller* (4 Cl. & F. 207) distinguished - - - - 536
See DISCHARGE OF SURETY. 1.

—— *Oakford* v. *European Shipping Co.* (1 H. & M. 182) followed - - - 536
See DISCHARGE OF SURETY. 1.

—— *Potter* v. *Duffield* (Law Rep. 18 Eq. 4) discussed - - - - 714
See FRAUDS, STATUTE OF. 2.

—— *Reg.* v. *West Riding Justices* (Law Rep. 5 Q. B. 33) followed - - - 49
See PUBLIC HOUSE. 3.

—— *Sale* v. *Lambert* (Law Rep. 18 Eq. 1) discussed - - - - 714
See FRAUDS, STATUTE OF. 2.

—— *Taylor* v. *Caldwell* (3 B. & C. 833) followed [C. A. 258
See SALE OF PART OF SPECIFIC CROP.

—— *Taylor* v. *Greenhalgh* (Law Rep. 9 Q. B. 487) distinguished - - C. A. 36
See SURVEYOR OF HIGHWAYS.

—— *The Northumbria* (Law Rep. 3 A. & E. 6) followed - - - C. A. 131
See LIMITATION OF SHIPOWNER'S LIABILITY.

CERTIORARI—Fees—County Court - 264
See COUNTY COURT FEES.

CESSER OF CHARTERER'S LIABILITY—*Shipping — Charterparty — Condition that Charterers' Liability shall cease when Cargo is shipped— "Loading excepted."*] A charterparty contained a clause: "This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed that they shall have":—*Held*, that "loading excepted" extended to delay in loading, and was not confined to the loading a full and complete cargo; and the charterers, therefore, remained liable for the delay, though they had shipped a complete cargo. LISTER *v.* VAN HAANSBERGEN - - - - 269

CHARTERPARTY—Cesser of liability - 269
See CESSER OF CHARTERER'S LIABILITY.

—— Demurrage—Bad weather - - 244
See DEMURRAGE.

CHEQUE—*Banker—Effect of crossing the Name of Banker—Bonâ fide Holder for Value—Effect of Statute* 21 & 22 *Vict. c.* 79, *s.* 2. A., being indebted to plaintiff, gave him a cheque for the

CHEQUE—*continued.*
amount, payable to plaintiff's order, upon the defendants, a banking company. Plaintiff indorsed his name on the cheque, and crossed it with the name of his bankers, "London and County Banking Co." The cheque was stolen and passed for full value to C. C. paid it into his bankers, the London and Westminster Bank; and they presented it to the defendants, who paid it to them notwithstanding the crossing, "London and County Banking Co." Plaintiff brought an action against defendants for a conversion, and for so paying the cheque, relying on 21 & 22 Vict. c. 79, s. 2, which enacts that a cheque on a banker, payable to order or bearer and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the cheque, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:—*Held* (affirming the judgment of the Queen's Bench), that the statute did not affect the negotiability of the cheque; the plaintiff had indorsed the cheque, so that C. had become bonâ fide holder of it before it was presented to the defendants, and the plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants. Smith *v.* The Union Bank of London - - - - C. A. 31

CITATION OF THIRD PARTIES — *Practice—Order XI., Rules* 1, 4; *Order XVI., Rules* 17–21—*Citation by Defendant of third Party—Notice on Corporation out of Jurisdiction.*] In order to entitle a defendant to serve a notice on a third person under Order XVI., Rules 17, 18, it is not necessary that the whole question between the plaintiffs, the defendant, and the third person should be identical; it is sufficient if it be primâ facie made out that a material question in the action is also a question between the defendant and the third person; and under such circumstances the Court will order service of the notice, if the plaintiff will not be prejudiced or delayed by the introduction of the third person. Therefore, where an action had been brought against the defendants for breach of charterparty, by which they agreed to discharge a cargo of nitrate of soda as fast as the custom of the port of discharge would allow, and the defendants had sold, at Liverpool, to a company carrying on business in Scotland, the cargo to arrive, and it was shewn that, by the custom of the trade, of which the company were aware, on such a sale of such a cargo the buyers would be bound to discharge in accordance with the custom of the port:—*Held*, that the defendants were entitled to an order citing the company to appear and take part in the trial under Order XVI., Rules 17, 18. *Held*, also, that Order XI., Rules 2, 4, as to service of writs, &c., out of the jurisdiction, applies to the service of notices on third persons under Order XVI., Rules 17, 18; and that service of the notice on the company in Scotland was therefore good. The Swansea Shipping Company *v.* Duncan [C. A. 644

2. —— *Practice—Parties—Notice of Defendant—Discretion of Court—Rules of Supreme Court, Order XVI., Rules* 17, 18, 19, 20, 21.] The Court

CITATION OF THIRD PARTIES—*continued.*
has power to order a notice to be served upon a third person, if there is one question common to all the parties, though the whole question to be tried between the plaintiff and the defendant is not the same as that which would arise between the defendant and the third person. But the exercise of the power is discretionary; and if the introduction of the third person will tend to prejudice or delay the plaintiff, leave will not be given to serve the notice. Bower *v.* Hartley [C. A. 652

3. —— *Practice—Order XVI., Rules* 18 *and* 21—*Claim by Defendants of Indemnity from third Parties—Directions as to Mode of having Question tried.*] To a claim by plaintiffs for not accepting 183 chests of shellac according to contract, defendants, among other defences, raised the defence that the shellac was not of the quality contracted for. The defendants had contracted with Messrs. R. and Messrs. T. respectively, for the sale to them of fifty chests on the same terms as their contract with plaintiffs, and the defendants cited Messrs. R. and T. under Order XVI., Rule 18. Messrs. R. consented to be bound by the judgment in the action as to the quality of the shellac:—*Held*, that Messrs. R. and T. had been properly cited under Order XVI., Rule 18, and the Court directed, under Rule 21, that Messrs. T. should be at liberty to appear and defend the action so far as regarded the question of the quality of the shellac, and that they should be bound by the finding of the jury on that question; and that the question of costs be reserved until after the trial. Benecke *v.* Frost - - 419

COMMON LAW PROCEDURE ACT, 1852, s. 142 [666
See Pleading Matter after Action.

COMPANY—Winding-up—Stay of action - 129
See Staying Proceedings.

COMPENSATION—Costs - - - 696
See Costs under Lands Clauses Act.

—— Telegraph Act - - - - 658
See Compensation under Telegraph Act.

COMPENSATION UNDER LANDS CLAUSES ACT—Costs - - - - - 696
See Costs under Lands Clauses Act.

COMPENSATION UNDER TELEGRAPH ACT—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 8, *subs.* 7—*Compensation for Loss of Office*—"*Annual Emolument*"—*Allowance for Travelling Expenses.*] The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster General to purchase the undertakings of telegraph companies. By s. 8, subs. 7, every officer and clerk of any company, the undertaking of which may be so purchased, who has been not less than five years in the service of telegraph companies, and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies, and is in receipt of remuneration at a rate of not less than 50*l.* a year, shall, if he receives no offer of an appointment by the Postmaster General in the telegraphic department, &c., receive during his life from the Postmaster General, by way of compensation for the loss of his office from the time at which the Government takes possession of the company's telegraph, an annuity payable half-

COMPENSATION UNDER TELEGRAPH ACT—*continued.*

yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office, on the 24th of June, 1868.—Mandamus to the Postmaster General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return, that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance as an indemnity against the extra personal expenditure incurred or assumed to be incurred by him while travelling on the business of the company beyond his ordinary expenditure, namely, 12*s.* 6*d.* for twenty-four hours' absence from headquarters, and 5*s.* for twelve hours' like absence when such last-mentioned absence did not oblige him to sleep away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:—*Held*, on demurrer, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation. The Queen *v.* The Postmaster General 658

CONCEALMENT OF MATERIAL FACT—*Marine Insurance — Non-communication by Agent of Assured.*] In an action on a policy on the ship *Jessie* "at and from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on the 27th of December, 1873, and that the last news the assured, the plaintiff, had of her was a letter from her captain, dated the 9th of January, 1874, and received on the 21st of January, in which the captain said he had had a fine passage out and had commenced loading, but was delayed by bad weather, and would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, and the captain had made a protest on the 3rd of January, but he did not mention the fact in this letter. The plaintiff insured on the 27th of February without communicating to the underwriters the letter of the 9th of January, but through his brokers gave them this information: "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, and avoided the policy.—The judge left to the jury the questions: 1. Was the ship an overdue ship at the time of the insurance? 2. Was any material fact concealed, and, if so, what? 3. Was there any misrepresentation, and, if so, was it fraudulent? The jury answered all the questions in the negative, and a verdict was entered for the plaintiff:—*Held*, on a rule for a new trial on the ground of misdirection, and on a motion to enter judgment for the defendants, on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been communicated, and that the plaintiff was responsible for the neglect of the captain in not communicating it, first, that judgment could not be entered for the defendants, as the point as to the anchor had not been distinctly taken at the trial, and, if it had, questions relating to it ought to have been left to the jury; and, secondly, on the authority of *Gladstone* v. *King* (1 M. & S. 35), that the particular average loss was an exception out of the policy, but the innocent non-communication of it by the agent of the assured did not avoid the policy: but that there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of the 9th of January, and the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated. Stribley *v.* The Imperial Marine Insurance Company - 507

CONCEALMENT OF MATERIAL FACT—*contd.*

CONDITION IN RESTRAINT OF MARRIAGE—*Devise—Distinction between Wills of Realty and Personalty.*] D. made his will as follows:—"I give, devise, and bequeath unto my sister Mary, her daughter Elizabeth, and Sarah, the daughter of David Jones, all my landed property, together with all my goods, chattels, and effects, to possess and enjoy the same jointly during their lifetime; and when any or some of the before-mentioned parties shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime: Provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed by the other-mentioned parties share and share alike:—*Held*, that the estate of Mary Davies in the land ceased on her marriage; for that the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Davies while she was unmarried; and the question whether the clause amounted to a condition or a limitation was immaterial, as the authorities upon such a distinction did not apply to a devise of realty. Jones *v.* Jones - 279

CONDITION ON TICKET—*Deposit for safe Custody—Railway Company—Conditions on Back of Cloak-room Ticket—Condition exempting from Responsibility for Goods above a certain Value.*] The plaintiff having been a passenger by the defendants' railway, her luggage (consisting of two packages) was deposited with a clerk of the defendants, at their cloak-room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed, in type easily legible, "left,

CONDITION ON TICKET—*continued.*
subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to, any package beyond the value of 5*l.*, unless at the time of the delivery of such package the true value and nature thereof . . . . shall have been declared, ... and the sum at the rate of 1*d.* per pound sterling . . . be paid . . . in addition to the before-mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak room."—The value of each package was more than 5*l.*, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the defendants' servants into the cloak-room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the defendants' servants. On these facts, the Court having power to draw inferences:—*Held*, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket.—*Held*, also, by Blackburn and Mellor, JJ. that the conditions were applicable to the loss, and protected the defendants, although the luggage was not deposited in the cloak-room.—But by Lush, J., that the contract was to warehouse the luggage in the cloak-room, and that the conditions only protected the defendants as to a deposit in the cloak-room.—*Henderson* v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) distinguished. HARRIS *v.* THE GREAT WESTERN RAILWAY COMPANY - - - - 515

CONDITION PRECEDENT—Operatic engagement [183, 410

See CONTRACT FOR PERSONAL SERVICES. 1, 2.

CONSIDERATION FOR CONTRACT—Fraud

See ILLEGAL CONSIDERATION [C. A. 679

CONSPIRACY—*Sufficiency of Indictment—Fraudulently obtaining settling Day for Shares of New Company—Official List of Stock Exchange.*] In an indictment for conspiracy, the first count stated that the undertaking called the "Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange, and that the defendants were respectively directors, secretary, and promoters of the E. Company, Limited, a new company which had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for

CONSPIRACY—*continued.*
transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, first, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c. Secondly, that, previous to such application being submitted to the committee, production of the following documents should be required—the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. Averment, that the defendants conspired to deceive Z. and others, the committee for general purposes, and to induce them to appoint a settling day, and falsely pretended to them that the number of shares of the company applied for by the public was 34,365, and the amount received on application 17,182*l.* 10*s.*; that 15,000 of the shares of the company had been allotted to the patentee, and that no shares of the company had been conditionally allotted; whereas no shares had been applied for by the public, the greater number of the shares had been allotted to the applicants upon condition that they should not be called on to pay for them, and whereas nothing had been received by the company upon the application for the shares; and 15,000 fully paid-up shares had not been taken by the patentee, &c.—Second count: That defendants were respectively directors, secretary, and promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of bonâ fide character, &c.; that the requirements of the second of the rules mentioned in the first count had been complied with—that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionnaires, owners of property, or others not being counted in such two-thirds) had been applied for and unconditionally allotted to the public—and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that the defendants requested a firm of stock-brokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5000 shares of the company on behalf of alleged vendors of patents, and that the defendants conspired to deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's subjects, who should themselves buy and sell the shares of the

CONSPIRACY—*continued.*
company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that the defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public, &c. (repeating the false pretences mentioned in the first count), and did thereby induce the committee to order the shares to be quoted in the official list after the 28th of May, 1874.—At the trial the jury found that the defendants were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means, and a verdict of guilty was entered:—*Held*, on a motion in arrest of judgment (Cockburn, C.J., doubting), that the second count was good, as it must be taken, by necessary inference, to allege that the object of the conspiracy was not merely to obtain a settling day and official quotation upon the Stock Exchange, and so to induce persons to believe that the company was duly formed and constituted, but also to induce persons to act on that belief and to deal in the shares of the company:—*Semble*, per Cockburn, C.J., that the first count was defective, as it did not shew any conspiracy to defraud the public. THE QUEEN *v.* ASPINALL - - - - - 730

CONTRACT—Condition precedent - - 183
See CONTRACT FOR PERSONAL SERVICES. 1.

—— Condition precedent - - - 410
See CONTRACT FOR PERSONAL SERVICES. 2.

—— Consideration—Fraud - - C. A. 679
See ILLEGAL CONSIDERATION.

—— Construction—Mercantile terms - 470
See RESCISSION OF CONTRACT. 2.

—— Rescission—Partial delivery - C. A. 344
See RESCISSION OF CONTRACT. 1.

—— Sale of specific crop - - C. A. 258
See SALE OF PART OF SPECIFIC CROP.

—— Ticket—Condition - - - 515
See CONDITION ON TICKET.

CONTRACT FOR PERSONAL SERVICES—*Construction of Contract—Condition Precedent—Engagement to sing for fifteen Weeks at a Theatre and in Concert Halls and Drawing Rooms—Stipulations that Singer will be ready for Rehearsals six Days before the commencement of the Engagement.*] Declaration that plaintiff, a singer, agreed with defendant, director of the Italian Opera in London, that he would undertake the part of first tenor in the theatres, halls, and drawing rooms in the United Kingdom during his engagement, to begin on the 30th of March, 1875, and terminate on the 13th of July, 1875, at a salary of 150*l.* per month. That plaintiff should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from the 1st of January to the 1st of December, 1875, without the written permission of defendant, except at more than fifty miles from London, and out of the season of the theatre. That defendant agreed to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals. Averment, that plaintiff did not sing anywhere in the United Kingdom from

CONTRACT FOR PERSONAL SERVICES—*cont.*
the 1st of January, 1875, to the date of the commencement of the action; that plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, on which day he arrived in London; and that, save as aforesaid, he was and is ready to perform his part of the contract. Breach, that defendant refused to receive plaintiff into his service.—Plea, that plaintiff was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore defendant refused to receive plaintiff into his service. Demurrer:—*Held*, that the stipulation as to rehearsals was not a condition precedent; for that it did not go to the root of the matter, as plaintiff was to sing in concerts at halls and drawing rooms as well as at the theatre, and was also to abstain from singing within fifty miles of London from the 1st of January previous to the commencement of the engagement on the 30th of March. That the plea was therefore bad. BETTINI *v.* GYE - 183

2. —— *Engagement to perform in a new Opera—Ability to perform on first Night—Condition precedent—Right to rescind.*] The plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre, at a weekly salary of 11*l.* for three months, provided the opera ran for that time, commencing on or about the 14th of November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of defendants till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. Plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, defendants' manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a douceur; if she was called on to perform, she was to receive 15*l.* a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendants refused to accept; on which she brought an action for wrongful dismissal. The jury found, inter alia, that the employment of Miss L. by the defendants under the circumstances was reasonable:—*Held*, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract. POUSSARD *v.* SPIERS AND POND 410

CORPORATION—Bye-law—Nuisance - 12
See BYE-LAW OF BOROUGH.

—— Service of writ - - - - 404
See SERVICE OUT OF THE JURISDICTION.

CORPORATION—*continued.*
—— Service out of jurisdiction - C. A. 644
See Citation of Third Parties. 1.
COSTS—Justice—Disqualification - - 173
See Disqualifying Interest.
—— Libel—Information - - - 482
See Costs in Libel.
—— Notice of motion - - - 77
See Notice of Motion.
—— Pleading matter after action - - 666
See Pleading Matters after Action.
—— Road indictment - - - 198
See Costs of Road Indictment.
—— Security - - - - - 313
See Action on Behalf of Several.
—— Solicitor—Agreement - - - 724
See Agreement as to Costs.

COSTS IN LIBEL—*Costs—Information for Libel—6 & 7 Vict. c. 96, s. 8—Defendants' Costs before filing of Information.*] Where upon the trial of an information for libel under 6 & 7 Vict. c. 96, judgment is given for the defendant, he is entitled to recover from the prosecutor costs incurred previously to the filing of the information; Blackburn, J., doubting. The Queen *v.* Steel 482

COSTS OF ROAD INDICTMENT—*Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50, *s.* 95—*Indictment directed by Justices for trying Obligation to repair—Costs of "such prosecution."*] On a summons for non-repair of a highway the obligation to repair to the extent alleged was disputed, and thereupon the justices, under s. 95 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), directed an indictment.—Upon the trial there was no evidence of obligation to repair the road as a general highway, and the indictment was amended so as to be restricted to the limited obligation, which was not in dispute:—*Held*, that an order under the above section, that the costs of the prosecution should be paid out of the highway rate could not be made by the judge of assize; for that the prosecution, though originally a prosecution directed by the justices, was no longer, after the amendment, "such prosecution" within the words of the section. The Queen *v.* Lee - - 198

COSTS UNDER LANDS CLAUSES ACT—*Lands Clauses Consolidation Acts*, 1845 (18 *Vict. c.* 18), *ss.* 23, 34—*Compensation for Land to be taken—Arbitration—Costs of Arbitration—"Sum offered."*] A company was empowered to take land for their undertaking and gave to the owner notice to treat under 8 Vict. c. 18, and he gave notice, under s. 23, of his desire to have the compensation settled by arbitration, naming his arbitrator, and the company named their arbitrator. The arbitrators appointed an umpire, and on two occasions enlarged the time for making their award. The company after this made an offer which was not accepted; and the arbitration proceeded. The umpire having awarded a less sum than that offered:—*Held*, that the offer was too late, and that the claimant was entitled to costs under s. 34.—*Fitzhardinge* v. *Gloucester Canal Co.* (Law Rep. 7 Q. B. 776) carried out. Gray *v.* North Eastern Railway Company - 696

COUNTY COURT—Fees—Action for - 264
See County Court Fees.

COUNTY COURT FEES—*Fees for Return to Certiorari—19 & 20 Vict. c.* 108, *ss.* 78, 79—*Action by Registrar for Recovery of Fees.*] By 19 & 20 Vict. c. 108, s. 78, the fees payable on the proceedings in the county courts shall be those mentioned in sch. (C); and such fees shall be paid in the first instance by the party on whose behalf any such proceeding is to be taken, before such proceeding is taken; and in default of payment of any fees, payment shall, by order of the judge, be enforced by such means as may be employed to recover any debt adjudged by the Court to be paid. By s. 79, the commissioners of the Treasury, from time to time, with the consent of the Lord Chancellor, may alter the fees in sch. (C), and may order new fees to be paid on any proceedings which are now or shall hereafter be authorized to be taken in such courts, whether any fee is now payable thereon or not.—An order of the Treasury, with the consent of the Lord Chancellor, was made in December, 1867, regulating the fees, amongst which was, "For making a return to a writ of certiorari, *ll.* 5*s.*"—The defendant, a solicitor, being defendant in a plaint in a county court, obtained a writ of certiorari to remove the plaint into the Court of Queen's Bench. He lodged the writ with the registrar of the county court; nothing was said about the payment of any fee; and the return was duly made.—The registrar having sued the defendant in the county court to recover the fee, it was proved, in addition to the above, that it was the practice of the registrar not to insist on the prepayment of fees by solicitors on whom he could rely for payment.—The judge having given judgment for the plaintiff; on appeal:—*Held*, that the return to the writ of certiorari was a proceeding taken in the county court within s. 79, and the fee was therefore within the authority of the commissioners of the Treasury; and by the tacit understanding between the plaintiff and defendant a promise to pay the fee was to be inferred, and therefore an action would lie.—By Lush, J., that an action would lie for the fee at common law, without reference to any tacit understanding between plaintiff and defendant. Batt *v.* Price [264

COUNTY RATE—*Municipal Corporation Act* (5 & 6 *Wm.* 4, *c.* 76), *ss.* 112, 117—*Borough "liable to contribute in Whole or in Part to County Rate"—District liable to County Rate added to Borough by* 2 & 3 *Wm.* 4, *c.* 64.] By the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 112, within ten days after the grant of a separate court of quarter sessions of the peace to any borough, every part of such borough shall be free from contributing otherwise than as hereinafter provided to any rate for the county in which the borough is situated.—By s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the cost arising out of the prosecution, &c., of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroners' inquests; and shall, not more than twice in every year, send a copy of the said

COUNTY RATE—*continued.*

account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed, upon such borough as the same shall be bounded according to the provisions of this Act.—Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included one part of the parish of Clewer in Berks which was exempt from the county rate, and on the passing of the Act a further part of the parish, which up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made co-extensive with those of the parliamentary borough. The borough has a court of quarter sessions and a charter containing a non-intromittant clause:—*Held*, that the word "borough," in the expression in s. 117, "borough liable to contribute in whole or in part to the county rate," must be taken to mean "area of borough," and New Windsor was therefore liable to contribute under 5 & 6 Wm. 4, c. 76, s. 117, in respect of the part of Clewer which, before 2 & 3 Wm. 4, c. 64, was liable to contribute. THE QUEEN *v.* THE TREASURER OF THE BOROUGH OF NEW WINDSOR - - 152

CROSSED CHEQUE—Effect of crossing C. A. 31
See CHEQUE.

DAMAGE TO PIER—Liability - C. A. 546
See HARBOUR CLAUSES ACT.

DAMAGES—Carrier - - - - 274
See DAMAGES AGAINST CARRIER.

—— Remoteness—Railway - - C. A. 42
See REMOTENESS OF DAMAGE.

DAMAGES AGAINST CARRIER — *Notice of Special Purpose—Non-delivery of Samples—Loss of Profits.*] The plaintiff, a manufacturer, who was in the habit of attending at agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show-ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show-ground at another place, when and where a similar show, at which he intended to exhibit, was to be held; but nothing was expressly said about this intention of the plaintiff. The samples did not arrive till after the day stipulated and when the show was over, and the plaintiff lost several days in going to meet them, and waiting for them. In an action for the breach of contract, a verdict was given for damages which included a sum for loss of time or loss of profit:—*Held*, the Court drawing the inference of fact that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract, that the plaintiff was

DAMAGES AGAINST CARRIER—*continued.*

entitled to the damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of his prospect of making profit at the particular show in question. SIMPSON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY [274

DEAF MUTE—*Incapacity to understand Proceedings at Trial for Felony.*] A deaf mute being tried for felony, was found guilty, but the jury found also that he was incapable of understanding, and did not understand, the proceedings at the trial:—*Held*, that he could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. THE QUEEN *v.* BERRY [C. C. R. 447

DEATH—Action by executor - - 599
See ESTOPPEL BY JUDGMENT.

DEFAULT OF APPEARANCE—Judgment 404
See SERVICE OUT OF THE JURISDICTION.

DEMURRAGE—*Ship and Shipping—Charterparty—Liability of Charterer for Delay in unloading caused by bad Weather.*] By a charterparty for a voyage with a cargo of timber from Pensacola to a safe port in the United Kingdom "sixteen working days were to be allowed the merchants for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days at 10*l.* per day."—The ship was ordered to M., and arrived at the usual place of discharge in the river and began unloading. It was the duty of the master to put the timber over the ship's side, and form it into rafts, and the charterer was to send tugs and take the rafts away. During the unloading bad weather came on, and, though the ship did not leave her anchorage, the rafts could not be formed, and the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days demurrage:—*Held*, that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days; and the defendant, therefore, was liable for the four days demurrage. THIS *v.* BYERS - 244

DESTRUCTION OF HIGHWAY—Repair - 703
See REPAIR OF ROAD. 1.

DEVISE—Before Wills Act - - - 685
See DEVISE WITHOUT WORDS OF LIMITATION.

DEVISE WITHOUT WORDS OF LIMITATION—*Devise of Land before the Wills Act to nine Persons, "to be equally divided among them"—Devise in Fee with executory Devise over for Life.*] A testator, by will of April, 1811, devised certain hereditaments to his granddaughter E. C. and her heirs. But if E. C. died without leaving lawful issue living at her death, the testator devised the hereditaments "unto and to the use of the nine

DEVISE WITHOUT WORDS OF LIMITATION—*continued.*
children of J. A., to be equally divided among them share and share alike." And he devised all the residue of his estate to his son P. C.—E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C.:—*Held*, 1st, that the executory devise over to the children of J. A., being before the Wills Act, created in them a tenancy in common for life only; and, 2ndly, that this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, and that, subject to the life estates, the property remained in E. C. and her heirs. GATENBY *v.* MORGAN **685**

DISCHARGE OF SURETY—*Two Joint Debtors, Right of, as against Creditor with Notice, to be treated as Principal and Surety.*] R. & H., being in partnership, were in the habit, through plaintiff's firm, of consigning goods to B. & S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which the plaintiffs accepted bills drawn by R. & H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, plaintiffs accepted fresh bills, which the defendants negotiated and handed the proceeds to plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. & H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock, &c., of the old firm. Plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiff's advances, and they brought an action against R. & H. to recover the balance.—R. raised as a defence that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R.:—*Held*, that R. & H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. & H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances.—*Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S.) 548) distinguished.—*Semble*, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him.—*Oakford* v. *European Shipping Co.* (1 H. & M. 182) accord. SWIRE *v.* REDMAN **[536**

2. —— *Principal and Surety — Interference with Rights of Surety—Discharge.*] N. was indebted to the plaintiffs, and by deed agreed, first, to pay them 3400*l.* on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of 6000*l.*, and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book-debts due to him, to the nominal amount of 8000*l.*, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value of 6000*l.* Subsequently an arrangement was made between the plaintiffs and N., by which, for an equivalent in shares and cash, they released to him their interest in the book-debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of 2250*l.* in the amount of shares:—*Held*, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him. POLAK *v.* EVERETT **[C. A. 669**

DISCHARGE OF SURETY—*continued.*

DISCOVERY—Documents. - -
See Cases collected under PRODUCTION OF DOCUMENTS.

—— Interrogatories - - - **C. A. 442**
See INTERROGATORIES.

DISCRETION OF JUSTICE—*Justice of the Peace—Refusal to issue Summons—Exercise of Discretion*—11 & 12 *Vict. c.* 42, *s.* 9—*Mandamus.*] Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace and do grievous bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which the defendants took part, and that one or other of them had previously offered money to different persons if they would commit acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, and a rule nisi for a mandamus having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit:—*Held*, that the rule must be made absolute, for although under 11 & 12 Vict. c. 42, s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion. THE QUEEN *v.* ADAMSON - **201**

DISQUALIFICATION OF JUSTICE—*Justice of the Peace — Disqualification of Justice during his Shrievalty*—1 *Mary, sess.* 2, *c.* 8, *s.* 2.] The statute 1 Mary, sess. 2, c. 8, s. 2,—which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise, in any county where he shall be sheriff, during the time of his exercising the office of sheriff.—has not been affected by any subsequent addition to the duties of justices of the peace, and continues to disqualify a justice from acting as such while he holds office as sheriff. *Ex parte* C. R. COLVILLE - - - - - - **133**

DISQUALIFICATION OF JUSTICE—*continued.*
—— Interest - - - - - 173
See Disqualifying Interest.

DISQUALIFYING INTEREST — *Justices of the Peace—Certiorari—Costs on Rule against Justices.*] H., the owner of a farm in the parish of Edmonton, bounded by the river Lee, entered into an agreement with the Enfield Local Board of Health, under which H. received the sewage of the Enfield district, and disposed of it over his farm. After a few months disagreements arose, and the Enfield Board took legal proceedings against H. to enforce the agreement. While these were still pending, H., after notice given to the board, diverted the sewage from his farm through a pipe into the old open channel or watercourse in the parish of Edmonton, through which the sewage had been used to flow into the river Lee. On this the Edmonton Local Board of Health threatened proceedings against the Enfield Board for the nuisance; and the Lee Conservancy took out summonses under their Act against H. for having opened the pipe into the channel, &c., and for continuing the use of it. On the summonses coming on for hearing, M., who was the chairman of the Enfield Local Board, and had taken an active part in its proceedings, sat with three other justices on the bench. H. objected to M. sitting as a justice, but he remained; and H. was convicted in penalties. A rule for a certiorari was then obtained for the purpose of quashing the convictions on the ground that M. was an interested justice. On shewing cause M. made affidavit that, though he sat on the bench, he took no part until the other justices had unanimously determined to convict H., when he, M., proposed a mitigation of the penalties, and that he did not sign the convictions:—*Held*, that M. had such an interest as might give him a real bias in the matter; consequently he ought not to have sat as a justice, and it was immaterial what part he really took in the matter; and the Court made the rule absolute with costs against M. The Queen *v.* Meyer - - - 173

DISTRESS—Privileged goods - - 210
See Privilege from Distress.

DIVORCE—Assault during marriage - 436
See Assault during Marriage.

DOCUMENTS—Discovery.
See Cases collected under Production of Documents.

ELECTION—Board of Health - - 217, 336
See Election of Board of Health. 2.

ELECTION OF BOARD OF HEALTH — *Regular and Casual Vacancy—Distinction of Candidates coming in for different Periods—*11 & 12 *Vict. c.* 63, *s.* 13.] Four members of a local board under the Public Health Act (11 & 12 Vict. c. 63) having gone out of office, three at the expiration of their term of office, and one by resignation before the end of his term, four new members were elected at one election without distinction. Neither in the notice of election nor in the voting papers delivered to the electors, was any distinction made between the regular vacancies and the casual vacancy:—*Held*, that the election was invalid. The Queen *v.* Rippon - - - 217

ELECTION OF BOARD OF HEALTH—*continued.*

2. —— *Invalidity of Votes—Decision of Chairman, when conclusive—*11 & 12 *Vict. c.* 63, *s.* 27.] After the election of a local board under 11 & 12 Vict. c. 63, the chairman proceeded under s. 27 to cast up the votes, and granted his certificate as to who were the successful candidates. On the trial of a quo warranto it appeared that the chairman had by mistake (1) put down votes to one candidate which the voting papers shewed had been given for another: (2) had omitted to reckon votes; and (3) had received as valid votes which were invalid:—*Held*, by the whole Court, that the certificate might be impeached as to the first and second class of votes; but, by Mellor and Field, JJ., not as to the last (Blackburn, J., dissenting on the last point). The Queen *v.* Collins 336

EMBARRASSING PLEADING — *Striking out—Order XXVII., Rule* 1 — *Discretion — Appeal.*] The striking out of pleadings as embarrassing, under Order XXVII., Rule 1, is a matter of discretion in the judge, and, as a general rule, no appeal from his order will be entertained.—A plea, to an action on a contract, that the plaintiff was suing on his own behalf, whereas he made the contract as agent for a company, will not be struck out as embarrassing. Golding *v.* The Wharton Saltworks Company - C. A. 374

EQUITABLE ASSIGNMENT—Bills of lading 709
See Securities for Bills of Exchange.

ESTOPPEL—Carrier—Servant - - 692
See Carriers Act. 1.
—— Judgment—Executors - - - 599
See Estoppel by Judgment.

ESTOPPEL BY JUDGMENT—*Executor and Administrator—Negligence causing Death of Intestate—Administratrix suing, first, under Lord Campbell's Act, and, secondly, for damage to personal Estate—Estoppel.*] Claim, stating that plaintiff was administratrix of her husband, L., who, being a season-ticket holder, was received by the defendants, a railway company, at their station to be conveyed as a passenger, and by their negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expense, &c. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it. And, secondly, that after the death of L., the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the defendants in respect of the injury caused to them by his death, and recovered damages. Reply, that the defendants were estopped from denying the facts relating to the accident, as in the previous action they had pleaded not guilty, and that L. was not received by them as a passenger, and those issues were found by the jury in the plaintiff's favour:—*Held*, on demurrer, first, that the second action was not barred by the judgment and satisfaction under the first; secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action.—*Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 C. P. 189), questioned. Leggott *v.* The Great Northern Railway Company - - - - - - - 599

EVIDENCE—False pretences—Letters - 19
See False Pretences. 1.
—— Ownership of waste - - - 161
See Waste adjoining Highway.
—— Poor-rate—Appeal - - - 9
See Appeal to Quarter Sessions. 3.
—— Prescription—Repair of sea-wall - 225
See Sea-wall.
—— Presumption—Marriage - - 446
See Bigamy.
—— Suffering gaming - - 84, 89
See Gaming. 2, 3.

EVIDENCE OF NEGLIGENCE—*Negligence—Master and Servant—Licensee—Railway Company, Duty of, towards Customer assisting Railway Servants in delivering his Goods.*] The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse-box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so:—*Held* (affirming the decision of the Queen's Bench), that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; 6 Ex. 123). Wright *v.* The London and North Western Railway Company - - - **C. A. 252**

2. —— *Principal and Agent or Contractor—Liability of Principal for Breach of Duty intrusted to Agent—Adjoining Landowners, Liability of.*] A man,—who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented,—is bound to see to the doing of that which is necessary to prevent the mischief; and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.—Plaintiff and defendant were respective owners of two adjoining houses, plaintiff being entitled to the support, for his house, of defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house; the contractor undertook the risk of supporting plaintiff's house, as far as might be necessary, during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—*Held*, on the above principle, that defendant was liable, even if the undertaking as to risk, &c., had

EVIDENCE OF NEGLIGENCE—*continued.*
amounted,—which it did not,—to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support plaintiff's house. Bower *v.* Peate [321

—— Agistment - - - - 79
See Agistment.
EXECUTOR—Action for death - - 599
See Estoppel by Judgment.
EXPENSES OF VALUATION LIST - 62
See Valuation List.
"FAILURE TO OBTAIN RELIEF" - 583
See Appeal to Quarter Sessions. 1.

FALSE PRETENCES—*Evidence — Advertisement inviting Answers by Letter—Letters at Post Office addressed to Prisoner, but not delivered.*] The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shewn at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s.*," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence:—*Held*, that, under the circumstances, the letters were rightly received in evidence. The Queen *v.* Cooper [C. C. R. 19

2. —— *Contract induced by Fraud—Passing of Property — Conviction of Fraudulent Party, Effect of, under* 24 & 25 *Vict. c.* 96, *s.* 100—*On Conviction "the Property shall be restored."*] By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property, by false pretences, "shall be indicted on behalf of the owner of the property, and convicted, in such case the property shall be restored to the owner." By s. 1 the term "property" shall include "not only such property as shall have been originally in the possession or under the control of any party, but also any property into which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately

FALSE PRETENCES—*continued.*

or otherwise."—A. Blenkarn took premises at 37, Wood Street, London, and wrote to the plaintiffs at Belfast ordering goods of them. The letters were dated 37, Wood Street, and signed A. Blenkarn & Co., but in such a way as to look like A. Blenkiron & Co., of which name there was a long-established firm at 123, Wood Street. One of the plaintiffs had known something of this firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing the letters and goods to "A. Blenkiron & Co., 37, Wood Street." The fraud having been discovered, Blenkarn was indicted and convicted of obtaining the goods by false pretences. Before the conviction, the defendants had bonâ fide purchased the goods of Blenkarn, and resold them to other persons. The plaintiffs having brought an action for the conversion of the goods:—*Held*, first, that, as the plaintiffs intended to deal with the person at 37, Wood Street (although they thought him other than he was), and sent the goods to him, the property in the goods passed, subject to be divested while in Blenkarn's hands, or in the hands of a purchaser with notice of the fraud; and that the defendants therefore, having purchased bonâ fide, acquired a good title.—Secondly, that the title acquired under the statute by the owner of the property dated from the conviction, and had no relation back to the original fraud; and that, the defendants having parted with the goods when they had a good title, the plaintiffs could recover neither the goods nor the proceeds. —*Held*, also, by Blackburn and Mellor, JJ., that the definition of "property" in s. 1 did not apply to the word "property" in s. 100.—*Hardman* v. *Booth* (1 H. & C. 803; 32 L. J. (Ex.) 105) distinguished.—*Harwood* v. *Smith* (2 T. R. 750) followed.—*Nickling* v. *Heaps* (21 L. T. (N.S.) (Ex.) 754) dissented from. LINDSAY *v.* CUNDY - 348

FELONY—Trial—Deaf mute - - 447
See DEAF MUTE.

FELONY OF SERVANT—Carrier - - 692
See CARRIERS ACT. 1.

FIXTURES—Statute of Frauds - - 700
See FRAUDS, STATUTE OF. 1.

FOREIGN CORPORATION — Citation of third parties - - - C. A. 644
See CITATION OF THIRD PARTIES. 1.

—— Service out of the jurisdiction - 404
See SERVICE OUT OF THE JURISDICTION.

FRAUD—Conspiracy—Indictment - - 730
See CONSPIRACY.

—— Contract—Consideration - C. A. 679
See ILLEGAL CONSIDERATION.

—— Property passing - - - 348
See FALSE PRETENCES, 2.

—— Repudiation of fraudulent purpose C. A. 291
See ILLEGAL CONTRACT.

FRAUDS, STATUTE OF—29 *Car.* 2, *c.* 3, *ss.* 4, 17 —*Sale of Tenant's Fixtures.*] The tenant of premises having become bankrupt, the trustee sold the tenant's fixtures on the premises to the plaintiff, and he sold them to the defendant, the landlord. There was no agreement in writing, and the value of the fixtures was above 10*l.* An action

FRAUDS, STATUTE OF—*continued.*

having been brought for the price:—*Held*, that the sale was not within s. 4 of the Statute of Frauds as the sale of an interest in land, nor within s. 17 as the sale of goods and chattels; and the action was therefore maintainable.—*Hallen* v. *Runder* (1 C. M. & R. 266) followed. LEE *v.* GASKELL - - - - 700

2. —— *Vendor and Purchaser—Memorandum of Agreement—Description of contracting Party as "Vendor"—Deposit, when recoverable—Acquiescence.*] The plaintiff signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars and conditions; and the auctioneer signed "as agent for the vendor." The plaintiff paid a deposit, and the vendor's solicitor forwarded to the plaintiff's solicitors an abstract of title, and in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, &c." And after examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." The plaintiff subsequently repudiated the contract, on the ground (inter alia), that the contract did not disclose the name of the vendor, and brought an action to recover the deposit:—*Held*, without deciding whether the memorandum was insufficient under the Statute of Frauds, that the plaintiff could not recover, having chosen, knowing that the vendors' name did not appear in the memorandum, to pay the deposit and receive the abstract of title; and that the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.—*Sale* v. *Lambert* (Law Rep. 18 Eq. 1) and *Potter* v. *Duffield* (Law Rep. 18 Eq. 4) discussed.—*Casson* v. *Roberts* (31 Beav. 613; 32 L. J. (Ch.) 105) questioned. THOMAS *v.* BROWN [714

—— Agreement for lease - - - 284
See AGREEMENT FOR LEASE.

FREIGHT PRO RATÂ ITINERIS—*Charterparty—Right to Freight where Voyage incomplete.*] A cargo of railway bars was shipped under a charterparty from a port in England to Taganrog in the Sea of Azof, "or so near thereto as the ship could safely get;" freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship on the 17th of December at Kertch, a port about thirty miles from Taganrog, which was as near as he could then get, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they, on the 27th of December, delivered it to the agent of the railway company, on his producing written autho-

FREIGHT PRO RATÂ ITINERIS—*continued.*
rity from the company together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight had been paid. The agent of the company gave a written acknowledgment that he had received the cargo "on the power of the charterparty and bill of lading passed to me by the railway company." The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—*Held*, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery, so near to Taganrog as the ship could safely get, within the charterparty; secondly, by Mellor and Quain, JJ., that the plaintiff was entitled to no freight; Cockburn, C.J., being of opinion that he was entitled to freight pro ratâ. METCALFE *v.* THE BRITANNIA IRONWORKS COMPANY - - - - - - 613

FRIENDLY SOCIETY—18 & 19 *Vict. c.* 63, *s.* 19—21 & 22 *Vict. c.* 101, *s.* 7—*Proceeding touching the Right of the Society—Action against Secretary.*] By the Friendly Societies Act (18 & 19 Vict. c. 63), s. 19, the trustees of any society are authorized to bring or defend any action, suit, or prosecution in law or equity, touching or concerning the property, right, or claim to property of the society.—By s. 7 of 21 & 22 Vict. c. 101, in any proceeding under this Act or the above Act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint, the defendant.—Proceedings having been taken by a member of a society in a county court to enforce a claim against the society, a compromise was come to between the plaintiff, the solicitor of the member, and the society, by which, inter alia, the society promised to pay the plaintiff certain costs and charges. These costs and charges not having been paid, the plaintiff sued the secretary of the society in a superior court:—*Held*, that this was a proceeding within s. 19 touching the right of the society, and was properly brought against the secretary under s. 7. ROBERTS *v.* PAGE - 476

GAMING—*Wager—Construction of Agreement—Action to recover Deposit*—8 & 9 *Vict. c.* 109, *s.* 18.] Plaintiff and W. deposited each 500*l.* with defendant, on an agreement that if W., on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of defendant, W. should receive the two sums deposited; but if W. failed in doing this the two sums were to be paid to plaintiff. Defendant decided in favour of W.; to this decision plaintiff objected, and before defendant paid over the money to W. demanded the return of his 500*l.* deposited. Defendant, nevertheless, paid both sums to W., and plaintiff brought an action to recover his deposit:—*Held*, that the agreement was a wager; but that, although 8 & 9 Vict. c. 109, s. 18, which makes all contracts by way of wagering null and void, enacts that no action shall be brought to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager, yet, on the authority of decided cases, that did

GAMING—*continued.*
not apply to the recovery of the sum deposited; and that, therefore, plaintiff having demanded his deposit back before it had been paid over by defendant, he was entitled to judgment. HAMPDEN *v.* WALSH - - - - - - 189

2. —— *Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—"*Suffering Gaming*" *on Licensed Premises—Proof of Knowledge on the Part of Innkeeper.*] In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17,—by which if any person licensed under the Act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties,—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises.—At the hearing of an information against the appellant, an hotel keeper, for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could see three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went upstairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The appellant having been convicted:—*Held*, that the case must be sent back to the justices with an intimation of the opinion of the Court that, though actual knowledge on the part of the appellant or his servants, in the sense of seeing or knowing of, the card playing, was not necessary to be shewn, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on. BOSLEY *v.* DAVIES - - - - - - 84

3. —— *Intoxicating Liquors* (*Licensing*) *Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—"*Suffering*" *Gaming on licensed Premises—Evidence to support the Charge.*] The appellant was charged under s. 17 of the Intoxicating Liquors (Licensing) Act, 1872 (35 & 36 Vict. c. 94), with "suffering" gaming to be carried on on her premises, an hotel at Epsom. It was proved by witnesses that, while standing in the public street at Epsom between half-past one and a quarter to two in the morning, they could hear the conversation of three persons in a room in the hotel. These three persons were a horse trainer, a jockey, and a gentleman of Newmarket, and from what was heard of their conversation, it was evident that they were playing for money. No direct evidence was given that the appellant knew of the gaming. The appellant stated that the house was closed at 11 p.m., that the three men were then in their private room, that she saw no cards, and did not supply any, and did not know of any card playing. The hall-porter, whose duty it was to attend upon customers, stated that he closed the house after 11 p.m., and retired to his own chair in a parlour

GAMING—*continued.*
beyond the bar, at the extreme end of the house. He knew nothing whatever of any gambling.—The justices drew the inference from the porter's evidence that his chair was removed to the greatest possible distance from the room where the guests were, in order that he might not hear what passed, and they thought that the appellant knew that gaming was intended to be carried on, and that she purposely took pains not to know what her guests were doing. On these grounds they convicted her:—*Held*, first, that the appellant was responsible for the conduct of the hall-porter whom she left in charge of the hotel; secondly, that there was evidence that the porter suspected what was going on, and connived at it; and that this evidence justified the conviction. REDGATE *v.* HAYNES - - - - - 89

GENERAL AVERAGE—Lien - - 367
See LIEN FOR CHARGES ON CARGO.

HARBOURS CLAUSES ACT—*Harbours, Docks, and Piers Clauses Act*, 1847 (10 *Vict. c.* 27), *s.* 74—*Non-liability of Owner of Vessel for Damage to a Pier, caused by the Vessel being driven against it by Stress of Weather without Default of any one*] The defendants' ship was driven on shore by a storm in endeavouring to make the port of Sunderland. The crew were taken off with difficulty, and she ship, being a complete wreck, was afterwards driven by the winds and waves against the pier belonging to the harbour, and did damage to it, for which the commissioners brought an action under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), which enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith":—*Held*, that the language of the section, though general, must be interpreted with reference to the well-known principle of the common law, that a person is not to be made liable for damage caused by his property, without any default of his, through what is generally termed the act of God; and that the defendants were therefore not answerable under the section.—*Dennis* v. *Tovell* (Law Rep. 8 Q. B. 10) overruled. THE RIVER WEAR COMMISSIONERS *v.* ADAMSON C. A. 546

HIGHWAY—Nuisance—Lamp - - 314
See NUISANCE IN HIGHWAY.

—— Obstruction—"Wilful" - - - 4
See "WILFUL OBSTRUCTION."

—— Repair—Destruction - - - 703
See REPAIR OF ROAD. 1.

—— Repair—Gravel pit - - - 608
See APPEAL TO QUARTER SESSIONS. 4.

—— Repair—Indictment—Costs - - 198
See COSTS OF ROAD INDICTMENT.

—— Repair—Owner - - - - 65
See REPAIR OF ROAD. 2.

HIGHWAY ACT, ss. 48, 185 - - - 608
See APPEAL TO QUARTER SESSIONS. 4.

—— **1835**, s. 72 - - - - 4
See "WILFUL OBSTRUCTION."

HIGHWAY ACT—*continued.*
—— **1835**, s. 95 - - - - 198
See COSTS OF ROAD INDICTMENT.

"**HOUSES FORMING A STREET**" - - 65
See REPAIR OF ROAD. 2.

HUSBAND AND WIFE—Assault—Divorce 436
See ASSAULT DURING MARRIAGE.

ILLEGAL CONSIDERATION—*Action for Breach of Contract—Failure of Consideration—Money had and received—Fraud.*] Defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to plaintiff for 15,000*l.* the sole and exclusive right to use and exercise the patent in B. Plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The object of plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company under the belief that, if the company bought of the plaintiff the right sold to him by defendants, the company would be entitled to the exclusive use of the process in B. Plaintiffs sued defendants to recover the 15,000*l.* on the ground that, as there was no exclusive right to the use of the process in B., the consideration had failed:—*Held* (affirming the judgment of the Queen's Bench), that no action could be maintained, I, on the ground that, although defendants ostensibly sold the exclusive right to use the process at B., yet plaintiff's object being to float a company, and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and he had in fact obtained that for which he had paid the 15,000*l.*: 2, on the ground that plaintiff being aware that no exclusive right to use the process in B. could be obtained, had entered into a contract with defendants in contemplation of a fraud upon the shareholders of the intended company. BEGBIE *v.* THE PHOSPHATE SEWAGE COMPANY, LIMITED - C. A. 679

ILLEGAL CONTRACT—*Delivery of Goods for fraudulent Purpose—Right of Owner to repudiate Purpose and recover the Goods.*] The plaintiff, being in embarrassed circumstances, in pursuance of an agreement between him and A., made over all his stock-in-trade to A., and fictitious bills of exchange were given by A. in plaintiff's favour. Possession of the goods was given to A., together with an inventory, but no bill of sale was executed by plaintiff. The object of the transaction was to prevent plaintiff's creditors getting hold of the goods, and so being paid in full. Defendant was a creditor for 100*l.*, and was cognisant of what was concocted between plaintiff and A. After A. had removed the goods from plaintiff's premises, two meetings of plaintiff's creditors were held, but no compromise was effected with the creditors. Some months afterwards A. executed a bill of sale of the goods to defendant for the alleged purpose of securing the debt due from plaintiff to defendant, but plaintiff was no party to the bill of sale, nor did he sanction or know of it. Plaintiff having demanded the goods from A. and defendant, brought an action against the defendant for the detention:—*Held*, by the Queen's Bench and

ILLEGAL CONTRACT—*continued.*
Court of Appeal, that, the fraudulent purpose not having been carried out, plaintiff was not relying on the illegal transaction, but was entitled to repudiate it, and recover his goods from A., and defendant had no better title than A., as he knew how A. had become possessed of the goods. TAYLOR *v.* BOWERS - - - - C. A. 291

IMPLIED COVENANT—Support - - 234
See SUPPORT.

INCAPACITY TO UNDERSTAND PROCEEDINGS—Trial - - - - 447
See DEAF MUTE.

INDECENT EXHIBITION—*Nuisance—Indecency—Booth for Indecent Exhibition—Public Place—Indecent Language.*] The prisoners were indicted in one count for keeping a booth for the purpose of shewing an indecent exhibition; in a second for shewing for gain an indecent exhibition in a booth; in a third, for shewing an indecent exhibition in a public place. It was proved that during the Epsom races the prisoners, who were travelling showmen, kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who would pay entered and saw an indecent exhibition:—*Held*, that the prisoners had committed an indictable offence, and that it was well laid in the indictment. THE QUEEN *v.* SAUNDERS C. C. R. 15

INDICTMENT—Conspiracy - - - 730
See CONSPIRACY.
—— Highway—Costs - - - 198
See COSTS OF ROAD INDICTMENT.

INFANT—Neglect to provide medical aid - 25
See MANSLAUGHTER.
—— Ratification—Set-off - - C. A. 460
See RATIFICATION BY INFANT.

INFORMATION—Libel—Costs - - 482
See COSTS IN LIBEL.

INFRINGEMENT OF PATENT—*Rights of Crown—Manufacture of Patented Articles under Contract with the Crown.*] The defendants entered into a contract with the secretary for war, acting for the Crown, to provide and deliver according to specifications, 13,000 rifles at a certain price each, the Government supplying the stock and the tube for the barrel of each piece. The defendants made and delivered the rifles, and in carrying out the contract the defendants necessarily infringed a patent for breech-action, of which the plaintiff was the sole assignee. The plaintiff brought an action against the defendants for this infringement:—*Held*, first, affirming *Feather* v. *Reg.* (6 B. & S. 257; 35 L. J. (Q.B.) 200), that the Crown, under letters patent in the usual form, by granting the sole and exclusive user of the patent to the patentee, left untouched the right of the Crown itself to the use of the patent.—Secondly, reversing the judgment of the Queen's Bench, that the contract of the defendants was for the manufacture of the rifles, and not for the sale of rifles already manufactured; that the principle of *Feather* v. *Reg.*, therefore, applied: for that it was immaterial whether the manufacture was by servants of the Crown or through the employment of an independent contractor, in either case

INFRINGEMENT OF PATENT—*continued.*
the user of the patent was the user of the Crown itself; and the defendants were therefore entitled to judgment. DIXON *v.* THE LONDON SMALL ARMS COMPANY (LIMITED) - - - C. A. 384

INSURANCE, MARINE—Concealment - 507
See CONCEALMENT OF MATERIAL FACT.
—— Mutual insurance—Right to sue C. A. 45
See MUTUAL INSURANCE. 2.
—— Mutual insurance—Rules - Ex. Ch. 563
See MUTUAL INSURANCE. 1.
—— Seaworthiness - - - Ex. Ch. 96
See SEAWORTHINESS. 2.

INTEREST—Disqualification—Interest - 173
See DISQUALIFYING INTEREST.
—— Ship—Limitation of liability - - 131
See LIMITATION OF SHIPOWNER'S LIABILITY.

INTERROGATORIES — *Practice — Time for delivering by Plaintiff—Order XXXI., Rules* 1, 5.] Under Order XXXI., Rule 1, the plaintiff may, before the statement of defence has been delivered, deliver interrogatories; but if he does, the interrogatories may be struck out under Rule 5, unless sufficient reasons are given by the plaintiff why the interrogatories are necessary at that stage of the action. MERCIER *v.* COTTON - C. A. 442

INTOXICATING LIQUORS—Licence.
See Cases collected under PUBLIC-HOUSE.

JOINT DEBTORS—Principal and surety - 536
See DISCHARGE OF SURETY. 1.
JUDGMENT—Default of appearance - 404
See SERVICE OUT OF THE JURISDICTION.
—— Estoppel—Executor - - - 599
See ESTOPPEL BY JUDGMENT.
JUDICATURE ACT, 1873, s. 45 - - 481
See RULE TO JUSTICES.
—— ss. 56, 57 - - - - 362
See TRIAL BY JURY.
JURY—Right of trial by - - - 362
See TRIAL BY JURY.
JUSTICE—Discretion—Refusal of summons 201
See DISCRETION OF JUSTICE.
—— Disqualification—Interest - - 173
See DISQUALIFYING INTEREST.
—— Disqualification—Sheriff - - 133
See DISQUALIFICATION OF JUSTICE.
—— Rule to state case - - - 481
See RULE TO JUSTICES.

LAMP—Highway—Nuisance - - 314
See NUISANCE IN HIGHWAY.
LANDLORD AND TENANT—Agreement for lease—Works done by tenant - - 284
See AGREEMENT FOR LEASE.
—— Distress—Privilege - - - 210
See PRIVILEGE FROM DISTRESS.
—— Support - - - - 234
See SUPPORT.
LANDS CLAUSES ACT—Costs - - 696
See COSTS UNDER LANDS CLAUSES ACT.
LAYDAYS—Demurrage—Bad weather - 244
See DEMURRAGE.

LEAVE TO DEFEND—Writ specially indorsed
See Writ specially indorsed. [416

LETTERS—Evidence—False pretences - 19
See False Pretences. 1.

LIBEL—Information—Costs - - 482
See Costs in Libel.

LICENCE—Beer - - - 49, 52, 55
See Public-house. 1, 2, 3.

—— Intoxicating liquors.
See Cases collected under Public-house.

LICENSING ACT, 1872 - - - 49, 207
See Public-house. 3, 4.

—— **1874, ss. 3, 9, 10** - - 1, 330
See Public-house. 5, 6.

LIEN—Master of ship—Charges on cargo 367
See Lien for Charges on Cargo.

LIEN FOR CHARGES ON CARGO — *Ship and Shipping—Right of Master and his Agent to detain Cargo for Expenses incurred with Respect to it exclusively—General Average—Authority of Agent authorized to receive Cargo—Salvage.*] A vessel having gone ashore with a cargo on board, the plaintiff, a ship agent, was put in possession of the ship and cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, and brought it to a place of safety, where he took possession of it. The hull broke up, and became a wreck. The expenditure by the plaintiff was not for the purpose of enabling the shipowner to perform his contract and to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—*Held*, that the plaintiff had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage.—*Held*, also, that an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, is impliedly authorized to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo. Hingston *v.* Wendt - - - - 367

LIMITATION OF SHIPOWNER'S LIABILITY—*Ship and Shipping—Action against Owner of Ship for Loss of Goods — Limit of Damages under Merchant Shipping Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Right of Owner of Goods to Interest in Addition.*] The owners of a ship, —though their liability to damages in respect of the loss of goods owing to a collision is confined, by s. 54 of the Merchant Shipping Amendment Act, 1862, to an aggregate amount not exceeding 8*l.* per ton of the ship's tonnage,—are liable to pay interest on that amount from the date of the collision.—*The Northumbria* (Law Rep. 3 A. & E. 6) followed. Smith *v.* Kirby - - 131

LIMITATIONS, STATUTE OF—Petition of right
See Petition of Right. [487

LOCAL BOARD—Election—Casual vacancy 217
See Election of Board of Health. 1.

—— Election—Validity of votes - - 336
See Election of Board of Health. 2.

LORD CAMPBELL'S ACT—Judgment—Estoppel
See Estoppel by Judgment. [599

MALICE—Evidence of - - - 23
See Malicious Injury.

MALICIOUS INJURY—*Cattle—Malice—Reckless Disregard as to whether act might injure—24 & 25 Vict. c.* 97, *s.* 40.] On a indictment under 24 & 25 Vict. c. 97, s. 40, for lawfully and maliciously killing, maiming, and wounding a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, and pushing it into her body. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare; but that he knew what he was doing would or might kill, maim, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not. The jury convicted the prisoner:—*Held*, that there was sufficient malice, and that the conviction was right. The Queen *v.* Welch - - C. C. R. 23

MANSLAUGHTER — *Infant Child — Neglect to provide Medical Aid — Bonâ fide Belief that Medical Aid unnecessary and wrong—31 & 32 Vict. c.* 122, *s.* 37.] By 31 & 32 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction." Upon the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of an infant child. The child was ill and wasting for eight or nine months from chronic inflammation of the lungs and pleura, and then died. The prisoner belonged to a sect who never call in medical advice, but call in the elders of their church to pray over the sick person. This course was pursued with the prisoner's child. The prisoner, however, who had no medical skill himself, consulted the person called in to pray over the child, who also had no medical skill, and they thought the child was suffering from teething, and gave it articles of diet which they thought suitable for a child so suffering. The prisoner had sufficient means to procure skilled advice, which was easily obtainable. The jury found on evidence, which, it was to be taken, was sufficient to warrant their findings: first, that the prisoner neglected to procure medical aid for the child when it was in fact reasonable so to do, and when he had the ability; secondly, that the death was caused by that neglect; thirdly, that he bonâ fide, though erroneously, believed that medical aid was not required for the child; fourthly, that he bonâ fide believed that it was wrong to call in medical aid. The learned judge thereupon directed a verdict of guilty to be entered:—*Held*, without expressing any opinion as to how the case would have stood at Common Law apart from the above statute, that that

MANSLAUGHTER—*continued.*
statute imposed a positive duty to provide adequate medical aid when necessary, and that that duty having been wilfully neglected by the prisoner, and death having ensued from that neglect, the prisoner was properly convicted of manslaughter. The Queen *v.* Robert Downes [C. C. R. 25

MARINE INSURANCE—Concealment - 507
See Concealment of Material Fact.

—— Mutual insurance—Right to sue - C. A. 45
See Mutual Insurance. 2.

—— Mutual insurance—Rules - Ex. Ch. 563
See Mutual Insurance. 1.

—— Seaworthiness - - - Ex. Ch. 96
See Seaworthiness. 2.

MARKET—*Markets and Fairs Clauses Act*, 1847 (10 *Vict. c.* 14), *s.* 13—*Selling or exposing for Sale otherwise than in own "Dwelling-place or Shop."*] The appellant was convicted under a local Act in similar language to s. 13 of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), which prohibits a person from selling or exposing for sale within the limits of a market articles for which tolls are authorized to be taken, except in his dwelling-place or shop.—The appellant resides in a street within the limits, and occupies a large yard adjoining his residence, in which are sheds and other places for sale of cattle and sheep, and he exposed there for sale 200 sheep. The entrance to the yard is from the street through double doors. After passing through the doors there is a place about thirty feet by twenty feet, covered in by beams and flooring. Appellant resides in a small house, supported by pillars on either side of this place, the floor of his house forming the ceiling of this under space; the yard extends further back without a ceiling, to about 158 feet from the doors. There are stairs from the dwelling-house down into the covered space, and this is the communication between the yard and sheds and the house:—*Held*, that the yard and sheds were not the dwelling-place or shop of the appellant; and that he was rightly convicted. McHole *v.* Davies - - - - - - 59

MARKETS AND FAIRS CLAUSES ACT, 1847, s. 13 - - - - - 59
See Market.

MARRIAGE—Presumption that building licensed [446
See Bigamy.

—— Restraint of—Condition - - 279
See Condition in Restraint of Marriage.

MASTER OF SHIP—Lien for charges on cargo [367
See Lien for Charges on Cargo.

MEASURE OF DAMAGES—Carrier - 274
See Damages against Carrier.

MEDICAL AID—Neglect to provide - 25
See Manslaughter.

MERCHANT SHIPPING ACT, 1854, s. 169 428
See Allotment of Wages.

—— *s.* 237 - - - - - - 134
See Arrival of Ship.

METROPOLIS LOCAL MANAGEMENT ACT, ss. 105, 256 - - 65, C. A. 686
See Repair of Road. 2, 3.

MOTION—Notice—Costs - - - 77
See Notice of Motion.

MUNICIPAL CORPORATION—Bye-law - 12
See Bye-law of Borough.

MUNICIPAL CORPORATION ACT, ss. 112, 117 [152
See County Rate.

MUNICIPAL ELECTION—Production of ballot papers - - - - 452
See Ballot.

MUTUAL INSURANCE—*Construction of Rules of —Clauses of Arbitration and against bringing Action—Form of Policy*—30 & 31 *Vict. c.* 23, *s.* 7 *—Specification of particular Risk or Adventure.*] The defendants were a limited company for the mutual insurance of ships belonging to members. By the articles of association: 4. No person shall become a member until he shall have signed the articles. 28. The business of the company shall be managed by directors. 39. The directors shall have full power to determine all disputes arising between the society and members concerning insurances or claims upon the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members; and no member shall be allowed to bring any action or suit against the society for any claim upon the society, except as is provided by these presents; and the directors may, if they think fit, cause any of such claims, and the amount to be paid to any member, to be referred to the decision of an average adjuster, and his decision shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom. 40. Two directors specially authorized and the chairman shall alone have power to sign and execute all policies approved by a board of directors. 63. If any member sell any vessel insured by the society, the purchaser of such vessel, if not a member, shall have no claim upon the society; and if a member, he shall have no claim until the vessel be entered in his name on the books of the society. 83. In all cases of any vessel insured by the society being lost or damaged, the owner, master, or mate or crew, shall, as soon as possible, give notice to the secretary of the society, who shall summon the board; and the directors shall proceed to examine the owner, master, and mate, and such of the crew as they may think necessary, as to the cause of the loss or damage, and shall make such decision as in their judgment the case may require. 84. If any member is dissatisfied with the decision of the directors as to the settlement of any loss or damage sustained by him, and such member shall procure ten members, not being directors, to join in a requisition to the directors to reconsider their decision, a board of not less than ten directors shall reconsider such decision. In December, 1868, the plaintiff became equitable mortgagee of the ship *H.*, D. being registered owner. In January, 1869, D. insured the vessel with the defendants, directing the policy to be made out in plaintiff's name; this was not done, but the policy was forwarded by the defendants to the plaintiff. The policy was headed with the name of the defendants' society, and after giving details as to the rates of insurance, &c., and referring to one of the rules or articles, at the bottom was: "March, 1869. This is to certify that Mr. D., as ship's husband for the *H.*, whereof

MUTUAL INSURANCE—*continued.*

is master at present time D., has this day paid 17*l.* 10*s.* for the insurance of 52 shares on the said vessel. Value of ship as per rule for this class, 7*l.* 10*s.* per ton, 1215*l.*" The policy was duly signed by the chairman and two directors. In January, 1870, the ship being on a voyage, the plaintiff applied in his own name for a renewal of the policy, and paid the premium, and a policy was forwarded to the plaintiff by the defendants, which was precisely like the former, except that the plaintiff's name was inserted as the ship's husband. No copy of the rules was ever given to the plaintiff, and he had no knowledge of the provisions until after the loss of the vessel. In March, 1870, a call was made on the plaintiff in respect of the *H.* for the losses of the society for the year 1869, and plaintiff paid it. Another call was made and paid in October 1870. In May, 1870, the *H.* was registered in plaintiff's name, but no notice was given of this to the defendants. In November, 1870, the *H.* was wrecked and became a total loss. The plaintiff sent in his claim, and on the 6th of January, 1871, D., who was master at the time of the loss, attended a meeting of the directors at their requisition, and they, having heard his account of the wreck, resolved that it was not found that the *H.* was lost by perils of the sea, and that the owners had no claim upon the society. No notice of this meeting or of the resolution was given to the plaintiff. On the 6th of April, 1871, a notice signed by ten members, but not signed by the plaintiff or D., was sent to defendants' office, and at the next quarterly meeting of the directors, no notice to attend having been given to plaintiff or D., the directors, without further inquiry, confirmed the former resolution. In an action brought by the plaintiff against the defendants to recover the amount of his insurance, in addition to the above facts, it was admitted by the defendants that the *H.* was a total loss by perils of the seas: the Court having power to draw inferences of fact: —*Held*, in the Court of Queen's Bench (by Blackburn, Mellor, and Lush, JJ.), 1st. That the policy sufficiently specified the particular risk or adventure within the meaning of 30 & 31 Vict. c. 23, s. 7. 2nd. That defendants were precluded from saying the plaintiff, who was the owner of the ship, was not a member of the society, after having accepted an insurance and taken premiums and other payments from him. 3rd. That the fact that the plaintiff turned his equitable interest into a legal interest after the policy was renewed by him did not bring the case within art. 63. But 4th. That defendants were entitled to judgment: for that the contract was contained in the policy and any of the articles applicable; and that article 39, which regulated the manner of the payment under the policy, did not exclude the jurisdiction of the courts of law, but made it a condition precedent to bringing an action that the loss of the particular member should have been first decided upon by the directors, subject to the appeal given by article 84.—The Exchequer Chamber reversed the judgment of the Queen's Bench. —By Amphlett, B., on the ground, that, if the investigation by the directors had been properly conducted the action could not have been maintained; but that the conduct of the directors, by adjudicating against the plaintiff's claim without

MUTUAL INSURANCE—*continued.*

hearing him, or giving him an opportunity of being heard, was not binding on the plaintiff; and that, under the circumstances, the defendants could not take advantage of the wrong done by their agents by setting up a defence that the determination of the directors in favour of the plaintiff was a condition precedent to bringing the action, and that an actual loss being admitted, the plaintiff was entitled to recover the amount.—By Kelly, C.B., and Brett, J., on the ground that such of the articles as were applicable must be read with the policy, and that articles 39, 83, and 84 were intended to prevent the insured from maintaining any action or suit at all in the ordinary courts in respect of any dispute arising on the policy; and that, therefore, the articles were invalid, and did not prevent the plaintiff from maintaining the action.—Archibald, J., and Pollock, B., were of opinion that the judgment ought to be affirmed, on the ground taken by the Queen's Bench:—*Held*, also, by Archibald, J., and Pollock, B., and *semble*, by Kelly, C.B., and Brett, J., that the policy was valid within 30 & 31 Vict. c. 23, s. 7. Edwards *v.* The Aberayron Mutual Ship Insurance Society - - Ex. Ch. 563

2. —— *Marine Insurance—Mutual Insurance Association—Manager suing for Contributions.*] The manager of a mutual insurance association cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member and profess to give such a power.—*Gray* v. *Pearson* (Law Rep. 5 C. P. 568) approved.—Declaration that the defendant was a member of a mutual insurance company and caused himself to be insured in respect of a vessel for a certain time, and that the plaintiff, who was manager of the association, in consideration that the defendant agreed to comply with certain rules which it was agreed between the plaintiff and defendant should form part of the policy, subscribed the policy on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. The declaration set out the rules, which provided how the amount of contributions to be paid by members should be ascertained, and that the manager should have power to sue for the amount due from any defaulting member. Averment that certain contributions became due which the defendant did not pay. On demurrer:— *Held*, that the action could not be maintained: for that the plaintiff signing on behalf of the members did not take upon himself any liability, and therefore there was no consideration, as between the plaintiff and defendant, for the promise of the defendant. Evans *v.* Hooper C. A. 45

NEGLIGENCE—Agent - - C. A. 36
See Surveyor of Highways.

—— Agistment - - - - 79
See Agistment.

—— Carrier—Carriers Act - - C. A. 302
See Carriers Act. 2.

—— Damages—Railway company - C. A. 42
See Remoteness of Damage.

—— Master and servant - - - 321
See Evidence of Negligence. 2.

NEGLIGENCE—*continued.*
—— Railway company—Licensee - **C. A. 252**
See Evidence of Negligence. 1.
NEW STREET—Paving - - **C. A. 680**
See Repair of Road. 3.
—— Paving—Owner - - - 65
See Repair of Road. 2.

NEW TRIAL—*Practice—Order for New Trial where Verdict for one and against other Defendant—Power of Court of Appeal—Order LVIII., Rules* 3, 5.] In an action against a railway company and H., the question was, whether the persons guilty of the alleged negligence were the servants of the company, so as to make the company liable, or of H. The jury found against the company, and in favour of H. The company obtained an order nisi for a new trial on the ground that the verdict was against the evidence; and by direction of the Court notice of the order was served on H. The Queen's Bench discharged the order, upon which the company appealed, but did not serve notice of appeal on H. The Court of Appeal, after hearing the facts of the case, ordered that the case should stand over, and notice of the appeal be served on H. H. appeared, but protested against the jurisdiction of the Court, under the circumstances, to call upon him to shew cause why a new trial should not be had as to him. The Court held that they clearly had jurisdiction, and on the merits made the order absolute generally for a new trial:—*Quære*, per Mellish, L.J., whether the Court has not now power to order a new trial as to one defendant, without disturbing the verdict as to another, where the merits of the case justify such a course. Purnell *v.* The Great Western Railway Company and Harris - - - - - **C. A. 636**

NOTICE OF MOTION—*Practice—Supreme Court of Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *Schedule, Order LIII., rules* 2, 3—*Failure to appear in Court after giving Notice of Motion—Costs.*] Where notice had been given of a motion before the Court to rescind a judge's order, and the parties giving the notice did not appear, the Court ordered them to pay the costs of the other party appearing to shew cause against the motion. Berry *v.* The Exchange Trading Company 77

—— Rule nisi—Award - - - 78
See Rule to pay Money awarded.
NOTICE OF TRIAL—Jury - - - 362
See Trial by Jury.
NUISANCE—Corporation—Bye-law - 12
See Bye-law of Borough.
—— Highway—Lamp - - - 314
See Nuisance in Highway.
—— Indecent exhibition - - - 15
See Indecent Exhibition.

NUISANCE IN HIGHWAY—*Action for Injury—Duty of Person hanging a Lamp over the Highway, so as to become dangerous if not in good Repair, to keep it in Repair—Principal and Agent.*] Defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As plaintiff was walking along, in November, the lamp fell on her and injured her. It appeared in evidence that in the previous August defendant employed an experienced gasfitter, C., to put this lamp, &c., in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron or bracket from which the lamp hung, and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination it turned out that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of C., but no negligence on the part of defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused it to fall:—*Held*, that the plaintiff was entitled to the verdict. By Lush and Quain, JJ., on the ground, that if a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the passengers; and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. By Blackburn, J., on the ground that, under the circumstances of the case, it was shewn that defendant knew that the lamp wanted repair in August, and it was his duty, therefore, to put it in reasonable repair, and the person he employed having failed to do so, defendant was liable for the consequences of the breach of duty. Tarry *v.* Ashton - - **314**

OBSTRUCTION OF HIGHWAY—"Wilful" - 4
See "Wilful Obstruction."
OPERATIC ENGAGEMENT—Ability to perform [410
See Contract for Personal Services. 2.
—— Rehearsal—Condition precedent - 183
See Contract for Personal Services. 1.
"OWNER" - - - - - 65
See Repair of Road. 2.
PARTIES—Action on behalf of several - 313
See Action on behalf of Several.
—— Citation of third parties **C. A. 644, 652, 419**
See Citation of Third Parties. 1, 2, 3.
PARTY WALL—Support - - - 234
See Support.
PATENT—Infringement—Right of Crown
See Infringement of Patent. [**C. A. 384**
PAVING—New street - - **C. A. 680**
See Repair of Road. 3.
PAVING EXPENSES—New street—Owners 65
See Repair of Road. 2.
PAYMENT—Appropriation - - - 178
See Appropriation of Payment.

PETITION OF RIGHT—*Money received by the Queen from Foreign State on Account of Debts due from Subjects of that State to British Subjects—Statute of Limitations.*] By a treaty between the

PETITION OF RIGHT—*continued.*
Queen of England and the Emperor of China, the Emperor agreed to pay to the British government the sum of 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent being largely indebted to British merchants. The money having been received by the British government:—*Held*, that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants.—The Statute of Limitations does not apply to a petition of right. Rustomjee *v.* The Queen - - - - 487

PLEADING—Matter arising after action - 666
See Pleading Matter after Action.

—— Striking out as embarrassing - C. A. 374
See Embarrassing Pleading.

—— Work done - - - - 284
See Agreement for Lease.

PLEADING MATTER AFTER ACTION—*Costs—Plea of Bankruptcy of Plaintiff after Plea, with other Pleas—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 142—*Reg. Gen.* 22 *and* 23 *T.T.*, 1853—*Order XX. Rules* 1-3 *of Act of* 1875.] The defendant pleaded pleas in bar of the action, and afterwards by leave of a judge, under s. 142 of the Common Law Procedure Act, 1852, pleaded in addition the bankruptcy of the plaintiff since action brought, and the plaintiff confessed the plea:—*Held*, that, under rr. 22 & 23 of T.T., 1853, the plaintiff was entitled to judgment for his costs up to the time of such pleading.—*Semble*, that the effect of Order XX., Rules 1-3, is the same. Foster *v.* Gamgee - - - - 666

POOR RATE—Appeal—Evidence - - 9
See Appeal to Quarter Sessions. 3.

—— Appeal—Failure to obtain relief - 503
See Appeal to Quarter Sessions. 1.

POOR LAW—Valuation - - - 62
See Valuation List.

PRACTICE—Appeal—Counsel heard C. A. 42
See Remoteness of Damage.

—— Assessors—Trial by - - - 362
See Trial by Jury.

—— Award—Rule to pay - - - 78
See Rule to pay Money awarded.

—— Citation of third parties C. A. 644, 652, 419
See Citation of Third Parties. 1, 2, 3.

—— Discovery—Documents.
See Cases collected under Production of Documents.

—— Interrogatories—Time to deliver C. A. 442
See Interrogatories.

—— Jury—Right of trial by - - 362
See Trial by Jury.

—— New trial—Several defendants C. A. 636
See New Trial.

—— Notice of motion—Costs - - 77
See Notice of Motion.

—— Parties—Suing on behalf of others - 313
See Action on Behalf of Several.

—— Pleading—Matter arising after action 666
See Pleading Matter after Action.

PRACTICE—*continued.*
—— Pleading—Striking out - C. A. 374
See Embarrassing Pleading.

—— Pleading—Work done - - - 284
See Agreement for Lease.

—— Question of law - - - - 727
See Special Case.

—— Renewal of writ - - - 250
See Renewal of Writ.

—— Rule nisi—Award - - - 78
See Rule to pay Money awarded.

—— Stay of action—Winding up of company 129
See Staying Proceedings.

—— Staying proceedings—Vexatious action 499
See Abuse of Process.

—— Writ specially indorsed—Leave to defend
See Writ specially indorsed. [416

PRESCRIPTION—Evidence—Repair of sea-wall
See Sea-wall. [225

PRESUMPTION—Ownership of waste - 161
See Waste adjoining Highway.

—— Marriage—Building licensed - - 446
See Bigamy.

PRINCIPAL AND AGENT—Negligence - 321
See Evidence of Negligence. 2.

—— Negligence - - - C. A. 36
See Surveyor of Highways.

PRINCIPAL AND SURETY—Joint debtors 536
See Discharge of Surety. 1.

—— Variation of rights - - C. A. 669
See Discharge of Surety. 2.

PRIVILEGE FROM DISTRESS—*Distress—Privilege of Goods to be sold by Auction—Privilege confined to the Premises of the Auctioneer.*] The privilege from distress of goods delivered to an auctioneer for sale is confined to goods on the premises of the auctioneer, and does not extend to goods sold on the premises of the owner of the goods.—A sale by auction of V.'s goods on the premises of V. having been advertised, plaintiff delivered some plate to the auctioneer to be sold along with V.'s goods. The auctioneer placed the plate on V.'s premises, where it was distrained during the auction by the landlord for rent in arrear:—*Held*, that the plate was not privileged; and the distress was valid. Lyons *v.* Elliott - - 210

PRODUCTION OF DOCUMENTS—*Practice—Discovery and Inspection of Documents — Order XXXI., Rule* 11—*Discretion of Judge—Only privileged Documents, Communication from Party's Solicitor, or from Agent employed at the Instance of the Solicitor—If Documents submitted to Judge, his Decision final.*] Under Order XXXI., Rule 11, a judge has no discretion as to refusing to allow, at the instance of one party to an action, the production of documents in the possession of another party relating to the matter in question, provided the documents are not privileged; and no document (other than a document of title) is privileged, except a communication from the party's solicitor, or from an agent employed by or at the instance of the solicitor.—Where, by the consent of both parties, the documents in question are submitted to the judge, his decision cannot be questioned in a Court of Appeal. Butros *v.* White - - - - - C. A. 423

PRODUCTION OF DOCUMENTS—*continued.*

2. —— *Discovery and Inspection—Agreement of Compromise relating to Subject-matter—Suit between Defendant and Third Party—Supreme Court of Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *Schedule, Order XXXI., Rules* 11, 12, 13, 18.] The plaintiffs were the owners of goods shipped on board the defendants' vessel the *B.*, and their case was, that the goods had been lost through a collision between the *B.* and the *H.*, owing to the defendants' negligence. A suit and cross suit had previously been commenced in the Court of Admiralty between the owners of the two vessels, and these suits were compromised by a private agreement in writing:—*Held*, that the plaintiffs were entitled to inspection of this agreement with an average statement attached to it: for that, without deciding that such an objection would be material, it did not appear that the owners of the *H.* objected to the inspection; and the document clearly related to the matter in question, as it might contain an admission of liability on the part of the defendants. Hutchinson *v.* Glover [138

3. —— *Discovery and Inspection—Action for not delivering Goods—Correspondence between Vendor and Person from whom he has purchased Goods—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77) *Schedule, Order XXXI.*] In an action for not delivering goods according to contract it appeared that the defendant, before selling the goods to the plaintiff, had purchased them from the K. company; and that shortly before the action was commenced he had sent to the company's agents two letters from the plaintiff's solicitors relating to the claims made in the action, requesting them to obtain information respecting these claims, and that a number of letters thereupon passed between the defendant and the company's agents upon the subject, some of them after the action was brought; and that ultimately the company agreed to allow the defendant a large deduction from the invoice price:—*Held*, that the plaintiff was entitled to inspection of the letters, as they could not be said to be confidential communications between the defendant and any one in the nature of his legal adviser, with a view to litigation.—*Quære*, whether, under the Judicature Act, 1875 (38 & 39 Vict. c. 77), Schedule, Order XXXI., the Court had a discretion to refuse inspection in cases where a Court of Equity has been in the habit of granting discovery. English *v.* Tottie - - - - - - 141

PRO RATÂ FREIGHT—Voyage broken - 613
See Freight Pro Ratâ Itineris.

PUBLIC HEALTH ACT, 1875, ss. 48, 269 - 558
See Appeal to Quarter Sessions. 2.

——, **s. 343** - - - - - - 220
See Repeal of Statute.

PUBLIC HOUSE—*Beer*—32 & 33 *Vict. c.* 27, *s.* 8—*Licence to retail Beer not to be consumed on Premises—Justices bound to state Ground of Refusal—Mandamus to hear and determine.*] By 32 & 33 Vict. c. 27, s. 8, no application for a licence to retail beer not to be consumed on the premises shall be refused, except upon one or more of four grounds specified. Justices, on refusing a licence, declined to state on which of the grounds they refused it:—*Held*, that the justices were bound to state the ground, and that, not having done so, they had not heard and determined the application according to law; and a mandamus was granted commanding them "to hear and determine" the application. The Queen *v.* David Sykes - - - - - - - 52

2. —— *Beer, Licence to sell, not to be consumed on the Premises—Strong Beer Licence—Non-residence no Disqualification—32 & 33 Vict. c.* 27, *s.* 8—26 & 27 *Vict. c.* 33, *s.* 1—*Mandamus to hear and determine.*] M., who held a strong beer licence, applied to licensing justices for a certificate to take out a retail licence to sell beer, &c., not to be consumed on the premises. The justices refused the licence under 32 & 33 Vict. c. 27, s. 8, subs. 4, on the ground that the applicant was not qualified as by law is required by reason of his intention not to reside on the premises:—*Held*, that, as the holder of a strong beer licence was entitled, under 26 & 27 Vict. c. 33, s. 1, to the retail licence without any other qualification, residence was not required; and that as the justices, therefore, had not determined according to law, a mandamus must be granted to them to hear and determine the application according to the statutes in that behalf. The Queen *v.* De Rutzen - - - - - - 55

3. —— *Certificate to sell Spirits by Retail—Adjournment of Annual Licensing Meeting—Fresh Application to Adjourned Sessions—New Qualification—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 7, 8—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 69.] The applicant, a grocer, applied at the general annual licensing meeting in August for a certificate to sell spirits under 35 & 36 Vict. c. 94, s. 68, by retail off his premises. The application was refused, on the ground that he did not hold a wholesale dealer's excise licence. He took out this licence, gave fresh notices, and applied again for a certificate at the adjourned sessions in September. The magistrates refused the application, on the ground that it had already been disposed of and could not be re-heard:—*Held*, on the authority of *Reg.* v. *West Riding Justices* (Law Rep. 5 Q. B. 33), that the second application ought to be heard, as it was not concluded by the previous decision. Ex parte Maughan - - - - - - 49

4. —— *Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Selling Intoxicating Liquor at Place not authorized by Licence—Addition to Licensed Premises.*] A house licensed under the Licensing Act, 1872 (35 & 36 Vict. c. 94), for the sale of intoxicating liquors by retail, was enlarged by the occupier, and the sale of such liquors was carried on in the part added:—*Held*, that the license must be taken to include reasonable additions to the original premises, and that it was a question of fact whether, after such alterations, the premises were substantially the same as those licensed. The Queen *v.* Raffles - - - - 207

5. —— *Licence to sell intoxicating Liquors off Premises—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9—*Grocer's and Draper's Shop communicating with each other—Grocer's Shop shut after prohibited Hours.*] The appellant, being licensed to

PUBLIC HOUSE—*continued.*
sell by retail intoxicating liquors to be consumed off his premises, was charged with keeping open his premises for the sale of such liquors after ten o'clock at night. He had two shops, a grocer's and a draper's shop, which formed part of his house, and both shops could be entered from the house at the back, as well as by the customers' entrance. The grocery business was carried on in a shop which had an entrance for customers in one street, and the draper's business in a shop which had an entrance for customers in another street. During the day there were means of going, and customers occasionally passed, from one shop to the other, but after ten o'clock shutters or partitions were put up and all means of communication, except through the house, prevented.—It was proved that the draper's shop was kept open till after ten o'clock at night; but that before ten o'clock the openings between the two shops were shut, and the grocer's shop left in darkness. The justices held the charge proved, and convicted the appellant:—*Held*, that the conviction was wrong, as there was no evidence that the house was open for the sale of liquour after ten o'clock. Brigden *v.* Heighes - - - - - 330

6. —— *Sale of Intoxicating Liquors—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 10—"*Bonâ fide Traveller*"—"*Nearest Public Thoroughfare*"—*Navigable Arm of Sea.*] The appellant was convicted of having supplied refreshment at prohibited hours to persons not being bonâ fide travellers.—By s. 10 of 37 & 38 Vict. c. 49, "A person shall not be deemed a bonâ fide traveller unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."—The appellant's licensed house is on the opposite shore of the Southampton Water from the town, and is distant from the town by water over a mile, and by the nearest road eight miles. There is an ancient ferry from the town appurtenant to appellant's house, and a toll is also paid to him by all persons landing from boats not belonging to him. The persons supplied with refreshment had lodged the night before in the town, and had crossed the water in their own boats:—*Held*, that the Southampton Water was a public thoroughfare within s. 10; and the conviction was right. Coulbert *v.* Troke - - - - - - 1

—— Suffering gaming - - - 84, 89
See Gaming. 2, 3.

PUBLIC PLACE—Indecency - - - 15
See Indecent Exhibition.

QUARTER SESSIONS—Appeal—Evidence 9
See Appeal to Quarter Sessions. 3.

—— Appeal—Failure to obtain relief - 503
See Appeal to Quarter Sessions. 1.

—— Appeal—Parish land - - - 608
See Appeal to Quarter Sessions. 4.

—— Appeal—Time to appeal - - 558
See Appeal to Quarter Sessions. 2.

QUEEN'S BENCH DIVISION—Rule to justices
See Rule to Justices. [481

QUESTION OF LAW—Practice - - 727
See Special Case.

RACECOURSE—Assessment—Appeal—Books 9
See Appeal to Quarter Sessions. 3.

RAILWAY COMPANY—Carrier—Damages 274
See Damages against Carrier.

—— Carriers Act - - - C. A. 302
See Carriers Act. 2.

—— Negligence - - - C. A. 252
See Evidence of Negligence. 1.

—— Negligence—Damages - C. A. 42
See Remoteness of Damage.

—— Ticket—Condition - - - 515
See Condition on Ticket.

RENT—Repealed statute—Validity - 220
See Repeal of Statute.

RATIFICATION—Infant—Set-off C. A. 460
See Ratification by Infant.

RATIFICATION BY INFANT—*Ratification of Contract after full Age—9 Geo.* 4, *c.* 14, *s.* 5—*Set-off—2 Geo.* 2, *c.* 22, *s.* 13.] Upon the true construction of 2 Geo. 2, c. 22, s. 13, and 9 Geo. 4, c. 14, s. 5, a set-off cannot be maintained of a debt contracted by the plaintiff during infancy and not ratified by him in writing after full age. Rawley *v.* Rawley - - - - C. A. 460

REMOTENESS OF DAMAGE—*Railway Company—Negligence—Consequential Damages—Court of Appeal—Practice on Argument of Appeal.*] A herd of plaintiff's beasts were being driven at 11 p.m., along an occupation road to some fields. The road crossed a siding of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them, and they rushed away. Six of them were ultimately found at between 3 and 4 a.m. lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line:—*Held* (affirming the judgment of the Queen's Bench), that, as defendants had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote.—On the argument of a case in the Court of Appeal two counsel will be heard on either side. Sneesby *v.* The Lancashire and Yorkshire Railway Company - - - C. A. 42

RENEWAL OF WRIT—*Practice—Writ of Summons—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 11—38 & 39 *Vict. c.* 77, *Sch., Order VIII, Rule* 1.] Where an original writ of summons, issued in January, 1875, and renewed in July, has been lost, the Court has no power to allow a renewal of it, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11, by ordering a verified copy to be sealed. Davies *v.* Garland - - - - - 250

REPAIR—Sea-wall—Liability - - 225
See Sea-wall.

REPAIR OF ROAD—*Highway—Indictment for Non-repair—Landslip covering Part of Highway*

REPAIR OF ROAD—*continued.*

—*Exemption from Liability.*] Upon the trial of an indictment for the non-repair of a highway, it appeared that the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, and part of the highway was carried away into the valley below, and its place filled up with earth, stones, and other débris. The débris was at one point twenty-five feet above, and at another two feet below, the level of the old road, and occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road it had been ascertained by boring that for a depth of thirty and a half feet from the surface there was nothing but soil, shale, and stones, and that there was no trace of the old metalled road, but the line of it was known and admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of 341*l.*:—*Held*, the Court having power to draw inferences of fact, that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it. The Queen *v.* The Inhabitants of Greenhow 703

2. —— *Metropolis Local Management Act* (18 & 19 *Vict. c.* 120), *ss.* 105, 250—"*Houses forming a Street*"—"*Owner.*"] The vestry of a metropolitan parish, having paved a new street, under 18 & 19 Vict. c. 120, s. 105, assessed the London School Board, in respect of a schoolhouse, as being "owners" of one of "the houses forming the street." The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses (with gardens at the back of them) between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:—*Held*, that the school-house, though not actually one of the houses "forming the street," yet practically formed part of it, within s. 105.—*Baddeley* v. *Gingell* (1 Ex. 319; 17 L. J. (Ex.) 63), followed.—*Held*, also, that the school board were "owners" within the definition in s. 250 of 18 & 19 Vict. c. 120. The School Board for London *v.* The Vestry of St. Mary, Islington - - - - - - 65

3. —— *Metropolis Local Management Acts*, 18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *s.* 77—*Paving New Street—Liability where Street paved through Half its Breadth.*] By the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street, under the compulsory powers of the former Act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter Act the expression "new street" is to include a part of any such street.—Buildings and land belonging to the defendants abutted upon a new street which

REPAIR OF ROAD—*continued.*

the vestry directed to be paved over half its breadth only; the part paved being that nearest the defendants' premises. The vestry apportioned the whole cost of the paving upon the houses forming the defendants' side of the street, omitting those on the other side:—*Held*, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged. The Vestry of Mile End *v.* The Guardians of Whitechapel Union C. A. 680

—— Gravel pit—Sale—Valuation - - 608
See Appeal to Quarter Sessions. 4.

—— Indictment—Costs - - - 198
See Costs of Road Indictment.

REPAIR OF SEA-WALL—Liability - 225
See Sea-wall.

REPEAL OF STATUTE—*Statute—Repeal with saving of Things "duly done"—Mistaken Reference in Rate to repealed Act—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 343.] Notice was given by a local board of health of intention to make a rate under the Public Health Act, 1848, and amending Acts. Before the notice had expired these Acts were repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), which contained a saving of "anything duly done" under the repealed enactments, and gave power to make a similar rate upon giving a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed Acts:—*Held*, that the rate was valid, the notice being a "thing duly done," and the accidental reference in the rate to the repealed Acts being immaterial to its validity. The Queen *v.* Justices of the West Riding of Yorkshire - - - 220

REPUDIATION—Illegal purpose - C. A. 291
See Illegal Contract.

RESCISSION OF CONTRACT—*Contract for Sale of Goods to be delivered within limited Time—Partial Delivery by Vendor—Right of Purchaser to reject—Shipment to be made "by Steamer or Steamers."*] The defendant entered into two contracts, each of which was for the purchase from the plaintiff of 4500 qrs. of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation." The plaintiff shipped on board one steamer 4511 qrs. to answer the first contract, and 1139 qrs. to answer in part the second contract. The plaintiff also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—*Held*, that the defendant was bound to accept the 1139 qrs. in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late. Brandt *v.* Lawrence C. A. 344

2. —— *Mercantile Contract, Construction of*—"300 *Tons of Rice to be shipped during the Months of March* $\frac{and}{or}$ *April.*"] Defendants by a contract, dated London, 17th of March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months

RESCISSION OF CONTRACT—*continued.*

of March $\frac{\text{and}}{\text{or}}$ April, per *Rajah of Cochin*." The 600 tons filled 8200 bags, of which 7120 were shipped between the 23rd and 28th of February, and the last bill of lading was signed on the latter day; of the other 1080 bags, 1030 were put on board on the 28th of February, and the remaining 50 on the 3rd of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:—*Held*, that, nine-tenths having been completely shipped in February, the rice was not shipped in March or April, and the defendants were not bound to accept it.—*Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530) distinguished. Shand *v.* Bowes - - - 470

RESTRAINT OF MARRIAGE—Condition 279
See Condition in Restraint of Marriage.

REVOCATION OF SUBMISSION—*Arbitration—Stay of Proceedings in Action under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.] A dispute having arisen between the plaintiffs and the defendant as to the balance due to the plaintiffs for work done for the defendant, they referred the matter, by an instrument in writing, to a specific arbitrator, W. No time was fixed for making the award, and there was no clause as to making the submission a rule of court. W. proceeded in the matter at once, and held his last sitting within three months. Several months having afterwards elapsed, and no award having been made, the plaintiffs, having given notice to W. and the defendant that they revoked the submission, brought an action against the defendant for the alleged balance. The defendant having applied for a stay of proceedings in the action under s. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125):—*Held* (affirming the judgment of the Queen's Bench Division), 1st. That such an agreement of reference (although not contained in the original instrument under which the matters in dispute arose) was within s. 11.—2ndly. That there was nothing in any of the statutes that made such an instrument irrevocable, and that the revocation was therefore valid.—But, 3rdly (overruling the judgment of Blackburn and Field, JJ., and affirming the judgment of Quain, J.), that in order to bring the case within s. 11 there must be an existing reference capable of being carried into effect; and that, the submission having been revoked, there was no such existing reference. On the first point, *Blyth* v. *Lafone* (1 E. & E. 435; 28 L. J. (Q. B.) 164) overruled: *Mason* v. *Haddan* (6 C. B. (N. S.) 526 affirmed. Randell, Saunders, & Co. (Limited) *v.* Thompson - - - - C. A. 748

RULE NISI—Arbitration - - - 78
See Rule to pay Money awarded.

RULE TO JUSTICES—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—20 & 21 *Vict. c.* 43—*Appeal from Inferior Court—Rule to Justices to state Case.*] An application for a rule calling upon justices to shew cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to the Court of Queen's Bench Division, and not to the Divisional Court of Appeal. Re Ellershaw; Ex parte Longbottom - - - - - 481

RULE TO PAY MONEY AWARDED—*Practice—Supreme Court of Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *Schedule, Order I., rule* 3—*Order LIII., Rule* 3—*Motion for Rule to shew Cause—Rule to pay Money awarded under Reference without Legal Proceedings.*] A rule to pay money awarded under an agreement of reference (which has been made a rule of Court) is a rule to shew cause, and no notice of application for such rule need be given. Re Phillips and Gill - 78

RULES OF SUPREME COURT, O. I., r. 3; O. LIII., r. 3 - - - - - 78
See Rule to pay Money awarded.

—— **O. II., r. 4; O. XI., r. 1** - - 404
See Service out of the Jurisdiction.

—— **O. III., r. 6; O. XIV., rr. 1–6** - - 416
See Writ specially indorsed.

—— **O. VIII., r. 1** - - - - 250
See Renewal of Writ.

—— **O. XI., rr. 1, 4; O. XVI., rr. 17–21 C. A.** 644
See Citation of Third Parties. 1.

—— **O. XVI., rr. 9, 13** - - - 313
See Action on Behalf of Several.

—— **O. XVI., rr. 17, 18, 19, 20, 21** - **C. A.** 652
See Citation of Third Parties. 2.

—— **O. XVI., rr. 18, 21** - - - 419
See Citation of Third Parties. 3.

—— **O. XX., rr. 1–3** - - - - 666
See Pleading Matter after Action.

—— **O. XXVII., r. 1** - - - - 374
See Embarrassing Pleading.

—— **O. XXXI.** - - - **138, 141, C. A.** 423
See Production of Documents. 1, 2, 3.

—— **O. XXXI., rr. 1, 5** - - **C. A.** 442
See Interrogatories.

—— **O. XXXIV. r. 2** - - - - 727
See Special Case.

—— **O. XXXVI., rr. 2, 3, 5, 6, 26** - - 362
See Trial by Jury.

—— **O. LIII., rr. 2, 3** - - - - 77
See Notice of Motion.

—— **O. LVIII. rr. 3, 5** - - **C. A.** 636
See New Trial.

SALE OF GOODS—Partial delivery—Rescission [**C. A.** 344
See Rescission of Contract. 1.

—— Specific crop - - - **C. A.** 258
See Sale of Part of specific Crop.

—— Time of shipment - - - 470
See Rescission of Contract. 2.

SALE OF LAND—Statute of Frauds - 700
See Frauds, Statute of. 1, 2.

SALE OF PART OF SPECIFIC CROP—*Contract of Sale, Construction of—Sale of specific Crop—Sale of "200 Tons of Potatoes grown on Seller's Land in W."—Condition—On failure of Crop Seller excused Performance.*] Defendant, in March, agreed to sell to plaintiff "200 tons of regent potatoes grown on land belonging to defendant in W., at 3*l.* 10*s.* per ton, to be delivered in September and October, and paid for as taken away." In March defendant had sixty-eight acres ready for potatoes, which were afterwards sown, and were

SALE OF PART OF SPECIFIC CROP—*cont.*
amply sufficient to have grown more than 200 tons in an ordinary season; but in August, without any default in defendant, the disease attacked the crop, and defendant was able to deliver only about eighty tons:—*Held*, affirming the decision of the Queen's Bench, that the contract was for potatoes off specific land, and was therefore a contract for a part of a specific crop, although not sown at the time; and was within the principle of *Taylor* v. *Caldwell* (3 B. & S. at p. 833). The contract was therefore subject to the implied condition that the parties shall be excused if before breach performance becomes impossible from the perishing of the thing without default of the contractor. Howell *v.* Coupland - **C. A. 258**

SAVING CLAUSE—Repealed statute - **220**
See Repeal of Statute.

SCHOOL BOARD—Repair of road - - **65**
See Repair of Road. 2.

SEAMAN'S WAGES—Allotment - - **428**
See Allotment of Wages.

SEA WALL—*Liability to repair—Water passing through Defendant's Land into that of adjoining Proprietors—Prescription—Evidence.*] The plaintiff was the occupier of land and the defendant the proprietor of adjoining land fronting to a creek communicating with the sea. It was necessary that each proprietor having land fronting the creek should maintain a sea-bank or wall to keep out the sea, and such a sea-wall had been maintained upon the creek time out of mind. The wall protecting the plaintiff's land was continuous with that protecting the defendant's land, and the level of the defendant's land was higher than that of the plaintiff. These walls have a tendency to gradually subside, and it becomes necessary from time to time to raise them to the proper height by placing fresh materials on the top. Owing to an extraordinarily high tide, the water flowed over the defendant's wall, and spread not only over his land but also over the land of the plaintiff, doing considerable damage. In an action to recover the amount of the damage, the jury found that the mischief had happened through the defendant's neglect to keep his wall at the proper level:—*Held*, first, that the mere fact, that each frontager had always maintained the wall in front of his own land, and that no one had thought it necessary to erect a wall or bank to protect himself from the water coming from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall not only for his own protection but for that of the adjoining landowners; secondly, that by the common law, apart from prescription, no such liability was cast on the defendant. Hudson *v.* Tabor - - - - - **225**

SEAWORTHINESS—*Ship and Shipping—Contract of Affreightment—Implied Warranty of Seaworthiness—Obligation of Shipowner.*] In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy.—In an action to recover damages for the loss of iron armour-plates, which were lost on board the defendants' ship, it appeared that the defendants, by their

SEAWORTHINESS—*continued.*
servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and left to them the questions,—was the vessel at the time of the sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season; secondly, if she was not in a fit state, was the loss that happened caused by that unfitness:—*Held*, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier. Kopitoff *v.* Wilson - - - - - **377**

2. —— *Marine Insurance—Time Policy—Warranty or Condition of Seaworthiness—Effect of Unseaworthiness.*] In an action on a time policy on ship, the defendant pleaded, 3rdly, that the ship was not lost by the perils insured against; 6thly, that after the making of the policy the plaintiff, knowing she was unseaworthy, wrongfully sent the ship to sea in such unseaworthy condition, and the loss was occasioned by the unseaworthiness and not otherwise.—At the trial it was proved that in January, 1872, the plaintiff, the owner of a steamship, effected an insurance on it with the defendant for twelve months; the policy, though for twelve months, was on a voyage policy form; the perils insured against were, inter alia, of the seas. At the time the policy was effected the ship was on the plaintiff's own premises in London undergoing repairs. She sailed on the 3rd of February for Gothenburg, and arrived there on the 7th of February; she leaked on her voyage more than could be accounted for by the weather she met with. She sailed for London on the 11th of February and met with bad weather; she leaked very much, became waterlogged, and did not readily answer to her helm; owing to this, and to the thickness of the weather, she was stranded on the English coast on the 15th of February, and became a total loss.—In answer to questions by the judge the jury could not agree whether the ship was unseaworthy when she sailed from London; but they found that, if she were, the plaintiff did not know of it: and they could not agree whether the unseaworthiness was the cause of the loss.—On these findings, the verdict having been entered for the plaintiff, a rule was obtained for a new trial on the ground that the findings did not warrant a verdict for the plaintiff:—*Held*, in the Court of Queen's Bench, by Blackburn and Quain, JJ., that the rule ought to be discharged, on the ground that, assuming the ship to have been unseaworthy when she sailed from London, and that she was lost by perils insured against owing to the unseaworthiness, yet as the plaintiff did not know of the unseaworthiness he was entitled to recover.—*Held*, in the Exchequer Chamber,—By Cleasby and Pollock, BB., that, on the same assumptions, the rule ought to be absolute for a new trial, on the ground that, where the

SEAWORTHINESS—*continued.*
ship, as in this case, is in the hands of the owners, and is intended for a voyage, and a time policy is made, the assured is under an obligation to have the vessel seaworthy at the commencement of the voyage; and if she be not seaworthy he cannot recover.—By Brett, J., and Amphlett, B., that there is no warranty or condition of seaworthiness in any time policy; and as the causa proxima of the loss was a sea peril, the verdict was right on the 3rd issue; and as the plaintiff did not know of the unseaworthiness the verdict ought to stand on the 6th issue also.—By Lord Coleridge, C.J., and Grove, J., that, assuming there is no warranty of seaworthiness in a time policy, the rule ought to be absolute, in order that a jury might ascertain which was the efficient predominating cause of the loss, perils of the seas or unseaworthiness, which was the issue raised by the 3rd and 6th pleas.—*Held*, also, by Lord Coleridge, C.J., that there is a warranty of seaworthiness in such a time policy as the present. Dudgeon *v.* Pembroke - - - - Ex. Ch. 96

SECURITIES FOR BILLS OF EXCHANGE—*Consignor and Consignee—Equitable Assignment of Bills of Lading—Right to recover against third Person for Detention.*] The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L., having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:—*Held*, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it. Lutscher *v.* Comptoir d'Escompte de Paris - - - - - - 709

SECURITY FOR COSTS—Suing on behalf of others
See Action on Behalf of Several. [313

SERVICE OUT OF THE JURISDICTION—*Foreign Corporation suable in England—Judgment against Foreign Corporation in Default of Appearance—Judgment signed without Leave—Rules of Court, 1875, Order II., Rule 4—Order XI., Rule 1—Appendix A., Part I., Form 3.*] Order XI., Rule 1, of the Rules of Court, 1875, which provides for service of a writ of summons out of the jurisdiction, applies to actions against a foreign corporation resident out of the jurisdiction.—When, in such an action, the plaintiff has issued the writ and served notice thereof by leave of the Court or a judge, he need not obtain any further leave to proceed and sign judgment for default of appearance under Order XIII.—Per Cockburn, C.J., Form 3 of Appendix A., Part I., First Schedule, Rules of Court, 1875, is calculated to mislead a

SERVICE OUT OF THE JURISDICTION—*cont.*
defendant into supposing that such further leave is necessary, and ought to be amended. Scott *v.* Royal Wax Candle Co. - - - - 404

—— Citation of third parties - C. A. 644
See Citation of Third Parties. 1.

SET-OFF—Infant—Ratification - C. A. 460
See Ratification by Infant.

SHERIFF—Disqualification as justice - 133
See Disqualification of Justice.

SHIP—Affreightment—Seaworthiness - 377
See Seaworthiness. 1.

—— Arrival—Boarding before arrival - 134
See Arrival of Ship.

—— Cargo—Lien for charges - - - 367
See Lien for Charges on Cargo.

—— Charterparty—Cesser of liability - 269
See Cesser of Charterer's Liability.

—— Charterparty—Demurrage - - 244
See Demurrage.

—— Damage to pier - - - C. A. 546
See Harbours Clauses Act.

—— Freight pro ratâ - - - - 613
See Freight pro ratâ itineris.

—— Insurance—Seaworthiness - Ex. Ch. 96
See Seaworthiness. 2.

—— Limitation of liability - - - 131
See Limitation of Shipowner's Liability.

—— Seamen—Allotment of wages - - 428
See Allotment of Wages.

SHIPMENT BY STEAMER OR STEAMERS—Partial delivery - - - C. A. 344
See Rescission of Contract. 1.

SHIPMENT DURING MARCH AND APRIL 470
See Rescission of Contract. 2.

SOLICITOR—Costs—Agreement - - 724
See Agreement as to Costs.

SPECIAL CASE—*Practice—Order to have Point of Law decided before Issues of Fact—Order XXXIV., Rule 2.*] A judge has power, under Order XXXIV., Rule 2, after writ and before statement of claim, to order a point of law to be decided before the issue of fact is tried.—Where, therefore, the writ of summons was indorsed, "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter under s. 41 of the New River Act, 1852," and after appearance the plaintiffs, on an affidavit, uncontradicted by the defendants, that the sole question between the parties was whether the defendants were bound under s. 41 to supply water by meter for road use, obtained an order under the above rule:—*Held*, that the order was rightly made. The Metropolitan Board of Works *v.* The New River Company - 727

SPECIAL INDORSEMENT—Leave to defend 416
See Writ specially indorsed.

SPECIFIC CROP—Sale of - - C. A. 258
See Sale of Part of Specific Crop.

STATUTE—Repeal—Saving clause - 220
See Repeal of Statute.

STATUTE OF FRAUDS—Agreement for lease
See Agreement for Lease. [284

STATUTE OF FRAUDS—*continued.*
—— Sale of land - - - - 700
See Frauds, Statute of. 1, 2.

STATUTE OF LIMITATIONS—Petition of right
See Petition of Right. [487

STATUTES:
1 Mary, sess. 2, c. 8, s. 2 - - - 133
See Disqualification of Justice.
2 Geo. 2, c. 22, s. 13 - - C. A. 460
See Ratification by Infant.
9 Geo. 4, c. 14, s. 5 - - C. A. 460
See Ratification by Infant.
1 Wm. 4, c. 68 - - 692, C. A. 302
See Carriers Act. 1, 2.
2 & 3 Wm. 4, c. 64 - - - - 152
See County Rate.
5 & 6 Wm. 4, c. 50, ss. 48, 105 - - 608
See Appeal to Quarter Sessions. 4.
—— —— s. 56 - - - C. A. 36
See Surveyor of Highways.
—— —— s. 72 - - - - 4
See "Wilful Obstruction."
—— —— s. 95 - - - - 198
See Costs of Road Indictment.
5 & 6 Wm. 4, c. 76, s. 90 - - - 12
See Bye-law of Borough.
—— —— ss. 112, 117 - - - 152
See County Rate.
6 & 7 Vict. c. 96, s. 8 - - - 482
See Costs in Libel.
8 & 9 Vict. c. 109, s. 18 - - - 189
See Gaming. 1.
10 Vict. c. 10, s. 74 - - C. A. 546
See Harbour Clauses Act.
10 Vict. c. 14, s. 13 - - - 59
See Market.
11 & 12 Vict. c. 42, s. 9 - - - 201
See Discretion of Justice.
11 & 12 Vict. c. 63, s. 13 - - - 217
See Election of Board of Health.
—— —— s. 27 - - - - 336
See Election of Board of Health. 2.
15 & 16 Vict. c. 76, s. 11 - - - 250
See Renewal of Writ.
—— —— s. 142 - - - - 666
See Pleading Matter after Action.
17 & 18 Vict. c. 104, s. 169 - - 428
See Allotment of Wages.
—— —— s. 237 - - - - 134
See Arrival of Ship.
17 & 18 Vict. c. 125, s. 11 - C. A. 748
See Revocation of Submission.
18 Vict. c. 18, ss. 23, 34 - - - 696
See Costs under Lands Clauses Act.
18 & 19 Vict. c. 63, s. 19 - - - 476
See Friendly Society.
18 & 19 Vict. c. 120, s. 105 - C. A. 680
See Repair of Road. 3.
—— —— ss. 105, 250 - - - 65
See Repair of Road. 2.
19 & 20 Vict. c. 108, ss. 78, 79 - - 264
See County Court Fees.

STATUTES—*continued.*
20 & 21 Vict. c. 43 - - - - 431
See Rule to Justices.
21 & 22 Vict. c. 79, s. 2 - - C. A. 31
See Cheque.
21 & 22 Vict. c. 101, s. 7 - - - 476
See Friendly Society.
24 & 25 Vict. c. 96, s. 100 - - 348
See False Pretences. 2.
24 & 25 Vict. c. 97, s. 40 - - - 23
See Malicious Injury.
25 & 26 Vict. c. 102, s. 77 - - C. A. 680
See Repair of Road. 3.
26 & 27 Vict. c. 33, s. 1 - - - 55
See Public House. 2.
27 & 28 Vict. c. 39, s. 1 - - - 503
See Appeal to Quarter Sessions. 1.
—— —— s. 7 - - - - 62
See Valuation List.
30 & 31 Vict. c. 23, s. 7 - - Ex. Ch. 563
See Mutual Insurance. 1.
31 & 32 Vict. c. 110, s. 8, sub-s. 7 - 658
See Compensation under Telegraph Act.
31 & 32 Vict. c. 122, s. 37 - - - 25
See Manslaughter.
32 & 33 Vict. c. 27, ss. 7, 8 - 49, 52, 55
See Public House. 1, 2, 3.
33 & 34 Vict. c. 28, ss. 4, 8, 9 - - 724
See Agreement as to Costs.
33 & 34 Vict. c. 78, ss. 26, 28 - - 760
See Tramway.
35 & 36 Vict. c. 33 - - - - 452
See Ballot.
35 & 36 Vict. c. 94, s. 17 - - - 34, 89
See Gaming. 2, 3.
—— —— s. 69 - - - - 49
See Public House. 3.
36 & 37 Vict. c. 66, s. 45 - - - 481
See Rule to Justices.
—— —— ss. 56, 57 - - - 362
See Trial by Jury.
37 & 38 Vict. c. 49, ss. 3, 9, 10 - - 1, 330
See Public House. 5, 6.
38 & 39 Vict. c. 55, ss. 48, 269 - - 558
See Appeal to Quarter Sessions. 2.
—— —— s. 343 - - - - 220
See Repeal of Statute.

STAY OF PROCEEDINGS—Arbitration C. A. 748
See Revocation of Submission.

STAYING PROCEEDINGS—*Company—Voluntary Winding-up—Stay of Proceedings in Action—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 138—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *subs.* 5.] An action having been brought in the Court of Queen's Bench against a company which was being voluntarily wound up, a Court of the Queen's Bench Division ordered the proceedings to be stayed under the Companies Act, 1862, ss. 85, 138, and the Judicature Act, 1873, s. 24, subs. 5. Walker *v.* The Banagher Distillery Company, Limited - - - - 129
—— Vexatious action - - - 499
See Abuse of Process.

STRIKING OUT PLEADING — Embarrassing pleading - - - - 374
See Embarrassing Pleading.

"SUCH PROSECUTION" - - - 198
See Costs of Road Indictment.

"SUFFERING GAMING" - - 84, 89
See Gaming. 2, 3.

SUMMONS—Discretion to refuse - - 201
See Discretion of Justice.

SUPPORT—*Lessor and Lessee—Remedy of Lessee against Lessor—Implied Covenant—Nonfeasance—Party Wall.*] The defendants were the owners of two houses in a street, numbered 38 and 40, and of a gateway under 40 and adjoining 38. In 1857 they demised the house No. 38 for a term of twenty-one years, the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises. In 1865 they granted a lease to the plaintiff of the house No. 40 for a term of eleven years, subject to a similar covenant to repair walls and party walls. The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway and the house No. 38 to the height of the first floor. The house of the plaintiff, No. 40, was built so as to extend in part over the top of the gateway and to rest upon this party wall between the gateway and the house No. 38, and to be supported by it. The plaintiff's covenant to repair did not extend to this wall, and there was no covenant by the defendants to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to the failure of support from the party wall, which had bulged in consequence of the pressure upon it from the plaintiff's premises:—*Held*, that there was no implied covenant on the part of the defendants to support the plaintiff's premises, although it might be an answer to an action upon the plaintiff's covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of the defendants. Colebeck *v.* The Girdlers Company - - - 234

SURETY—Discharge - - C. A. 669
See Discharge of Surety. 1, 2.

SURVEYOR OF HIGHWAYS—*Negligence—Principal and Agent—Liability for Misfeasance—5 & 6 Wm. 4, c. 50, s. 56.*] Defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labour at 3½*d.* per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out, and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; and a considerable length of road was so left without light or fencing at night; and, in consequence of this, the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning, was negligence; but that defendant did not personally interfere in doing the work, or directing the road to be left as it was:—*Held*, the Court having power to draw inferences of fact, that the defendant was liable.—*Taylor* v. *Greenhalgh* (Law Rep. 9 Q. B. 487) distinguished.—*Semble*, that s. 56 of 5 & 6 Vict. c. 50 (which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions), did not apply to such a case. Pendlebury *v.* Greenhalgh - C. A. 36

TELEGRAPH ACT, 1868, s. 8, subs. 7 - 658
See Compensation under Telegraph Act.

"THINGS DULY DONE" - - - 220
See Repeal of Statute.

THIRD PARTIES—Citation—Corporation [C. A. 644
See Citation of Third Parties. 1.

—— Citation—Discretion - - C. A. 652
See Citation of Third Parties. 2.

—— Citation—Practice - - - 419
See Citation of Third Parties. 3.

TICKET—Condition—Contract - - 515
See Condition on Ticket.

TIME POLICY—Warranty of seaworthiness
See Seaworthiness. 2. [Ex. Ch. 96

TIME TO APPEAL—Quarter sessions - 558
See Appeal to Quarter Sessions. 2.

TRAMWAY—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 26 & 28—*Expenses of Superintendence of Road Authority.*] By the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 25, every tramway authorized by special Act shall be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road. By s. 26, the promoters from time to time, for the purpose of laying down, maintaining, and renewing any tramway, or any part thereof, may open and break up any road, subject to the following regulations: 1. They shall give to the road authority seven days' notice of their intention, specifying the time when and the portion of the road which they intend to break up and open; 2. They shall not open or break up any road, except under the superintendence and to the satisfaction of the road authority; 3. They shall pay all reasonable expenses to which the road authority is put on account of such superintendence. By s. 28, the promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road as lies between the rails of the tramway, and eighteen inches beyond the rails on each side of the tramway.—A tramway was laid as follows: The rails were laid on longitudinal sleepers, which rested in and upon a bed of concrete six inches thick,

TRAMWAY—*continued.*
extending under the whole space between the sleepers and for a considerable distance on each side. Upon the concrete rested, both between and on each side of the rails, granite paving stones, which formed the surface of the roadway for general traffic, the upper surface of the stones being level with the surface of the rails. During the year 1872–73, the defendants, the tramway company, without any previous notice, on different occasions lifted and relaid paving stones between and within eighteen inches on either side of the rails, sometimes as many as a dozen stones at one time, in order, by slightly lifting the sleeper with a lever, and packing ballast under it, to raise the surface of the rail, which had sunk below the level of the stones. For the safety of the general traffic over the road, it was necessary that any sinking of the rails below the level of the stones should be immediately made good. It would not be possible, consistently with the safety of the general traffic, to wait for the expiration of a seven days' notice before doing so. The surveyor of the plaintiffs, the road authority, from time to time inspected and examined the work while being done by the defendants:—*Held*, that what the defendants had done came under s. 28, and not under s. 26, and the plaintiffs were not entitled to be paid by the defendants the expenses of the superintendence. The Vestry of St. Luke *v.* The North Metropolitan Tramways Company - - - - - - 760

TRAMWAYS ACT, 1870, ss. 26, 28 - - 760
See Tramway.

TRIAL—Mental incapacity - - - 447
See Deaf Mute.

TRIAL BY JURY—*Judicature Act*, 1873, *ss.* 56, 57—*Order XXXVI., Rules* 2, 3, 5, 6, 26—*Trial before Judge with Assessors—Right of Defendant to give Notice of Trial by Jury.*] Where the plaintiff gives notice of trial before a judge sitting with assessors, the defendant has a right under Order XXXVI., Rule 3, by giving notice within the time specified, to insist on a trial before a judge and jury; and the Judicature Acts and Rules of Court do not give power to the Court or a judge to deprive the defendant of this right. Sugg *v.* Silber - - - - - - - 362

TRIAL WITH ASSESSORS—Right to jury, 362
See Trial by Jury.

UNCERTIFICATED BANKRUPT—*Bankruptcy—Bankrupt without Order of Discharge—Trustee's Title to After-earnings of Bankrupt—Proceeds of Personal Labour—Money recovered by Bankrupt as Compensation for Breach of Contract.*] A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court 104*l.* as six months' salary in lieu of proper notice of dismissal:—*Held*, that the bankrupt's trustee could claim this money before it was paid to him, as against any creditors, subsequent to and without notice of the bankruptcy; for that, first, the trustee had been guilty of no breach of duty

UNCERTIFICATED BANKRUPT—*continued.*
towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy. Wadling *v.* Oliphant. Evans *v.* Morris 145

UNION ASSESSMENT COMMITTEE ACT, 1864 62
See Valuation List.

VALUATION LIST—*Union Assessment Committee Act Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 7—*Expenses of Overseers in preparing Valuation List—Allowance by Vestry after Expenses incurred.*] Under the Union Assessment Committee Act Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7,—which enacts that "when the overseers of any parish incur any expense in making out any valuation list or supplemental list, under the provisions of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), with the consent of the vestry given by express resolution, after due notice, they may charge such expense, so far as the same may be authorized by the vestry, upon the poor-rate," &c.,—the consent of the vestry is sufficient, though given after the expenses have been incurred. The Queen *v.* The Overseers of Chorlton-upon-Medlock - 62

WAGER—Construction of contract - 189
See Gaming. 1.

WAGES—Seaman—Allotment - - 428
See Allotment of Wages.

WARRANTY OF SEAWORTHINESS—Affreightment - - - - 377
See Seaworthiness. 1.

—— Time policy - - - Ex. Ch. 96
See Seaworthiness. 2.

WASTE—Ownership—Presumption - 161
See Waste adjoining Highway.

WASTE ADJOINING HIGHWAY—*Evidence—Presumption as to Ownership of Land by Side of Highway—Admission against Interest—Inclosure Act.*] In 1818 R. inclosed a piece of land of 11 perches, lying by the side of a lane which was a highway, in the manor of W. At that time G. was the owner in fee of the adjoining freehold land. In 1820 G. died, having devised his estates to H. W. G. for life, with remainders over. In 1836 a private Act was passed, by which commissioners were empowered to inclose and allot the wastes of the manor, including encroachments made within twenty years of the passing of the Act, and pieces of waste land lying by the sides of any public roads or lanes. In 1837 R. died, and W. F. R., his heir, took possession of the 11 perches. In 1838 the commissioners made and published their award, by which they awarded to H. W. G. two allotments, one of 24 perches, which included the 11 perches, and another of 29 perches similarly situate. H. W. G. took possession of the second allotment; but W. F. R. remained in possession of the piece of 11 perches till he sold it, in 1859, to the defendant. In 1874 H. W. G. died, and the plaintiff succeeded to the estate under the will of G. He then brought ejectment against the defendant to recover the 11

WASTE ADJOINING HIGHWAY—*continued.*
perches:—*Held*, that the admission of H. W. G. against his interest, by accepting the allotment under the award, was strong evidence that the land was waste of the manor, and rebutted the presumption arising from the situation of the slips of land, that they belonged to him as owner of the adjoining land. That, consequently, the plaintiff's right of entry commenced from the time of the award, when there was a tenancy for life, and not from 1818; and, therefore, the Statute of Limitations had not run against the plaintiff, and he was entitled to recover. Gery *v.* Redman [161

WILFUL OBSTRUCTION—*Highway—Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 72—*Allowing Trees to grow so as to obstruct Footway.*] By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, if any person shall "wilfully obstruct the passage of any footway," he is made liable to a penalty of 40*s.* The respondent was summoned under s. 72 for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:—*Held*, by Mellor and Quain, JJ. (Cockburn, C.J., dissenting), that the respondent, in merely suffering the trees to grow so as to be an obstruction, did not "wilfully obstruct" the way within s. 72. Walker *v.* Horner - - - - - 4

WILL—Condition in restraint of marriage 279
See Condition in Restraint of Marriage.

—— Devise—Before Wills Act - - 685
See Devise without Words of Limitation.

WINDING UP COMPANY—Stay of action - 129
See Staying Proceedings.

WINE AND BEERHOUSE ACT, 1869 49, 52, 55
See Public House. 1, 2, 3.

WORDS—"Actually arrived in dock" - 134
See Arrival of Ship.

—— "Annual emolument" - - - 658
See Compensation under Telegraph Act - - - - 658

—— "Failure to obtain relief" - - 503
See Appeal to Quarter Sessions. 1.

—— "Houses forming a street" - - 65
See Repair of Road. 2.

—— "Nearest public thoroughfare" - 1
See Public House. 6.

—— "Owner" - - - - 65
See Repair of Road. 2.

—— "Such prosecution" - - - 198
See Costs of Road Indictment.

—— "Suffering gaming" - - - 84, 89
See Gaming. 2, 3.

—— "Things duly done" - - - 220
See Repeal of Statute.

WORK DONE—Agreement for lease - 284
See Agreement for Lease.

WRIT—Renewal—Practice - - - 250
See Renewal of Writ.

—— Service—Foreign corporation - - 404
See Service out of the Jurisdiction.

—— Special indorsement—Leave to defend 416
See Writ specially indorsed.

WRIT SPECIALLY INDORSED—*Practice—Terms as to Defendant being let in to defend—Order III., Rule* 6—*Order XIV., Rules* 1-6.] When a writ is specially indorsed under Order III., Rule 6, if the defendant makes an affidavit under Order XIV., and goes beyond the bare statement that he has a defence on the merits, shewing what the grounds of his defence are, and gives reason for thinking that the defence is substantial, he ought not to be compelled to pay money into court as a condition to his being let in to defend. Runnacles *v.* Mesquita - - - - 416

END OF VOL. I.

BIBL. CNDIN.

LONDON :
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.